135-595

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 957.

WILLIAM ASPINWALL, PLAINTIFF IN ERROR,

vs.

PETER BUTLER, RECEIVER OF THE PACIFIC NATIONAL BANK OF BOSTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 15, 1888.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 29, 1889

3 UNITED STATES OF AMERICA, *Massachusetts District*, } *ss:*

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Saturday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and eighty-seven.

Before the Honorable Le Baron B. Colt, circuit judge.

PETER BUTLER, of Boston, in the State of Massachusetts, Receiver of the Pacific National Bank of Boston, Plaintiff,
v.
WILLIAM ASPINWALL, of Brookline, in said District, Defendant. } No. 2003 A, Law.

In an action of contract.

The following declaration was filed with the plaintiff's writ:

4 *Plaintiff's Declaration.* (*Filed with Plaintiff's Writ.*)

LINUS M. PRICE, Receiver,
v.
WILLIAM ASPINWALL.

Plaintiff says that the Pacific National Bank of Boston, heretofore and prior to the acts herein mentioned, was duly organized and authorized to do business as a national bank or banking association, under and by virtue of an act of Congress entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved on the 3d day of June, A. D. 1864, and which said provisions are embraced in title sixty-two of the Revised Statutes of the United States, located and having its banking-house at Boston, in State of Massachusetts; that said banking association thereupon proceeded and for a long time thereafter continued to issue currency and receive deposits of money, discount negotiable paper, and generally to transact the business of a national banking association, as authorized by the aforesaid act of Congress; that in its said business as aforesaid the said banking association contracted, prior to the 22d day of May, A. D. 1882, large debts and liabilities, and that, to wit, on the 22d day of May, A. D. 1882, the Comptroller of the Currency of the United States was satisfied, from a report of proceedings of the board of directors of the Pacific National Bank of Boston, previously made to said Comptroller, that said banking association, the Pacific National Bank of Boston aforesaid, was insolvent and unable to pay its debts and liabilities; that the said Comptroller of the Currency, upon being satisfied of the insolvency of said banking association as aforesaid, did, to wit, on the 22d day of May, A. D. 1882, and as authorized and empowered to do by virtue of section one of an act of Congress entitled "An act authorizing the appoint-

ment of receivers of national banks, and for other purposes," approved on the 30th day of June, A. D. 1876, duly appoint the said Linus M. Price receiver of all the property, books, records, and assets of the said banking association, as is provided by law; and the said Linus M. Price accepted said appointment and duly qualified as such receiver aforesaid, and executed such bond and with such surety as required by the laws of the United States and approved by said Comptroller, and which said appointment more fully appears by a copy thereof, hereto annexed, marked "Schedule A," or the original of which, ready to be produced in court, the said plaintiff craves leave to refer; that thereupon the said plaintiff, under the direction of the said Comptroller, took possession of the books, records, property, and assets of every description of the Pacific National Bank of Boston aforesaid, and has ever since been and is now engaged in collecting and converting the assets thereof and discharging in other respects the lawful duties of his said receivership.

And the plaintiff avers that the property and assets of said banking association are insufficient to pay and satisfy its debts and liabilities contracted as aforesaid, and that in order to provide for the paying of the same it became and was and is now necessary to enforce the personal liabilities of the stockholders, as is provided and imposed by said act of Congress.

And the said plaintiff further avers that the said Comptroller of the Currency did ascertain and determine, upon data satisfactory to him, that the assets and credits of said association were insufficient to pay its said debts and liabilities, and that in order to provide the money necessary to pay said debts and liabilities of said association it was necessary to enforce the individual liability of the shareholders of said association, as provided by the aforesaid act of Congress and especially by the twelfth section thereof (section 5151, U. S. Revised Statutes); and that said Comptroller, in pursuance of the powers for that purpose vested in him by the aforesaid act of Congress, and to that end did, to wit, on the 27th day of November, A. D. 1882, order and make an assessment upon the said shareholders of said association, including the said defendant in this action, and each and every one of them, equally and ratably, to the amount of one hundred dollars per centum ($100 per cent.) of the par value of the shares of the capital stock in the said association held or owned by them respectively, including the defendant, at the time of its insolvency, failure, or suspension as aforesaid; which said assessment more fully appears by a copy of the order making the same, hereto annexed, marked "Schedule B," or the original thereof, ready in court to be produced, and to which the said plaintiff craves leave to refer.

And the said plaintiff further avers that the said Comptroller has decided that it is now necessary to institute a suit or suits against the said shareholders, including the defendant, to enforce their said personal liability, and to that end has ordered and directed the said plaintiff to institute, in the proper court or courts, such suit or suits as may be necessary to enforce against each and every shareholder of the said association, equally and ratably, his or her personal lia-

bility as such shareholder, in manner and to the extent provided by the twelfth section of said act (section 5151, U. S. Rev. Statutes)—that is to say, the rate of one hundred per cent. hereinbefore specified.

And the said plaintiff further avers that the said defendant was at the time of said insolvency, failure, or suspension of said banking association a shareholder of its capital stock to the amount of fifty shares, of the par value of one hundred dollars per share, and of the aggregate value at par of five thousand dollars, and held or was entitled to hold in his possession or control the usual stock certificates as such shareholder in said banking association; and that, to wit, on the first day of December, A. D. 1882, the said plaintiff made demand in writing upon the said defendant as such shareholder for payment of the sum of five thousand dol-
5 lars, the amount of said assessment so made as aforesaid, under and by virtue of the order of the Comptroller of the Currency, hereto annexed and marked "Schedule B," as aforesaid.

And the said plaintiff avers that by reason of the premises the said defendant has become and now is indebted and liable to pay to the plaintiff as such receiver one hundred per cent. of the amount of said capital stock—that is, one hundred dollars upon each and every share so held and owned by the said defendant at the time of the declared insolvency, failure, and suspension of said banking association as aforesaid, and which said liability or indebtedness of the defendant amounts in the whole to the sum of five thousand dollars, which said sum of money so due, owing, and payable to the said plaintiff as receiver as aforesaid, though often requested, the said defendant has not paid the same or any part thereof, but has wholly neglected and refused and still does neglect and refuse so to do.

The defendant owes the plaintiff the said sum, with interest thereon, which is demanded.

RANNEY & CLARK, *Attorneys.*

SCHEDULE A, Referred to in Foregoing Declaration.

WASHINGTON, *May* 22, 1882.

Whereas it appears from the report of proceedings of the board of directors of the Pacific National Bank of Boston, located in the city of Boston, county of Suffolk, and State of Massachusetts, at a meeting held on May 20, 1882, that the said bank is insolvent, and being satisfied that the said bank is insolvent and unable to pay its just and legal debts:

Now, therefore, I, John Jay Knox, Comptroller of the Currency, in pursuance of the power and authority vested in me by law and under the provisions of sect. 1 of an act of Congress entitled "An act authorizing the appointment of receivers of national banks, and for other purposes," approved June 30, 1876, do hereby appoint Linus M. Price receiver of the Pacific National Bank of Boston, with all the powers, duties, and responsibilities given to or imposed upon a

receiver under provisions of the Revised Statutes of the United States which authorize the appointment of a receiver.

In witness whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, this twenty-second day of May, A. D. 1882.

[L. S.]

(Signed) JOHN JAY KNOX,
Comptroller of the Currency.

SCHEDULE B, Referred to in Foregoing Declaration.

In the Matter of "THE PACIFIC NATIONAL BANK OF BOSTON," Massachusetts.

To all whom it may concern:

This is to certify that I have taken an accounting of the condition of the estate of the Pacific National Bank of Boston, Massachusetts, aforesaid, and of its assets and liabilities, and I do find and determine, upon data satisfactory to me, that in order to provide the money necessary to pay the debts of said association it is necessary now to enforce, to the extent hereinafter mentioned, the individual liability of the shareholders of said association provided for by the twelfth section of the act of Congress entitled "An act to provide a national currency," approved June 3, 1864, and by sect. 5151 of the Revised Statutes of the United States, approved June 22, 1874, and to that end, and in pursuance of the powers vested in me by the said acts, I have made and hereby order and make an assessment or requisition upon the shareholders of said association and bank and each and every one of them, equally and ratably, to the amount of one hundred per centum of the par value of the shares of the capital stock in the said association held or owned by them respectively at the time of its failure or suspension, and I direct Linus M. Price, receiver, heretofore appointed, of the said association, to take the necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

In witness whereof I have hereto set my hand and caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, this twenty-seventh day of November, A. D. 1882.

[L. S.]

(Signed) JOHN JAY KNOX,
Comptroller of the Currency.

6 The writ in this cause is dated the fourteenth day of March, A. D. 1883, and was duly entered at the May term of this court, A. D. 1883, when and where the parties appeared by their respective attorneys.

This cause was thence continued from term to term to the May term, A. D. 1884, when, on the sixteenth of June, the following answer was filed:

Defendant's Answer. (*Filed June* 16, 1884.)

And now comes the said defendant and, for answer to the said plaintiff's writ and declaration, denies each and every allegation therein contained, and this denial is intended to apply to all the allegations regarding said plaintiff's appointment and authority as receiver, as well as to all other material allegations in said writ and declaration contained.

And, in addition to such general denial, the defendant further denies that at the time of said alleged insolvency, failure, or suspension of said national banking association and of said alleged decision and order of the Comptroller of the Currency he, the said defendant, was a shareholder in said banking association or held or was entitled to hold any certificate or certificates of any shares of its capital stock.

And the defendant further denies that any such shares or certificates of stock as were issued to or held by him, if any such there were, were ever legally or properly issued, or were ever valid
7 or existing shares or certificates of stock; and he says that such shares or certificates of stock, if any there were issued to him or held by him, were illegally issued in violation of law, and cannot therefore form the basis of any liability to assessment or other personal liability, as claimed by said plaintiff.

And, further answering, the defendant says that the assessment upon said stock or shares set forth in the plaintiff's declaration, if any such was ever made, was an unlawful and void assessment, and that no action lies to recover the same by said plaintiff.

And, further answering, the defendant says that in the month of September, in the year 1881, an attempt was made by the directors of said banking association to increase its capital stock to one million dollars by the issue of 5,000 shares of new stock; that said attempt was never carried out or perfected; that new stock in said banking association, with a capital of one million of dollars, was never issued, but that certain other so-called new stock was fraudulently, irregularly, and illegally issued, and that in ignorance of the facts the defendant became the holder of some of said so-called new shares; that the defendant was induced to become the holder of some of said so-called new stock by fraud and by being induced to believe and believing that the same was regularly and legally issued to the amount of 5,000 shares ($500,000), and that at the time of such issue said bank was solvent, whereas, in fact, said shares were not issued to said number or amount nor in conformity to law, and said bank was then deeply and wholly insolvent.

8 And, further answering, the defendant says that whatever cause of action ever existed upon any such shares of stock as are described in said declaration existed upon stock held by the defendant as executor, administrator, guardian, trustee, and that this defendant, in said capacity, has not in his hands any assets with which to pay said assessment or any part thereof, and that this defendant is not personally liable therefor.

By his attorney, BENJAMIN N. JOHNSON.

This cause was thence continued to the October term, A. D. 1884, when, on the 11th day of November, the following agreement was filed:

Agreement to Waive Trial by Jury. (*Filed Nov.* 11, 1884.)

In the above-numbered actions (this case, No. 2003 A, and other cases) the parties thereto waive a trial by jury and agree that said actions be submitted to the court.

A. A. RANNEY,
Attorney for Plaintiff.
BENJ. N. JOHNSON,
For the Defendant.

This cause was thence continued from term to term to the October term, A. D. 1885, when the following motion was filed:

Motion of Peter Butler, Receiver. (*Filed May* 10, 1886.)

Peter Butler, of Boston, in the district of Massachusetts, represents that he has been duly appointed and qualified as re-
9 ceiver of the Pacific National Bank in place of Linus M. Price, removed. He therefore asks to be admitted as a party plaintiff in said action and for leave to prosecute the same in substitution for said Price.

By his attorneys, RANNEY & CLARK.

Which motion was allowed by the court.

This cause was thence continued from term to term to the May term, A. D. 1887, when the same came on to be heard and was fully heard by the court, and was thence continued under advisement to this present October term, when, on the fourth day of January, A. D. 1888, the court make and file the following findings of facts:

Findings of Facts. (*Filed January* 4, 1888.)

This case was tried by the court without the intervention of a jury, a jury trial being waived.

The court makes the following findings of facts, namely:

That the Pacific National Bank of Boston, Massachusetts, was created and did business as a national banking association organized under the laws of the United States; was located in Boston, and passed into the hands of a receiver, to be wound up as an insolvent institution, May 22, 1882, as alleged in the declaration in that behalf. The Comptroller of the Currency, on November 27, 1882, for the purpose of enforcing the individual liability of stockholders, made the order of assessment, and the defendant was notified thereof and payment of the same demanded, all as alleged in that behalf
10 in the declaration. Peter Butler was appointed receiver in place of Linus M. Price, the original plaintiff, removed, and

was admitted as plaintiff to prosecute this action. Articles five and six of the articles of association of the Pacific National Bank, being all thereof material to this suit, are as follows:

Fifth. The capital stock of this association shall be two hundred and fifty thousand dollars, to be divided into shares of one hundred dollars each; but the capital may be increased, according to the provisions of section 5142 of the Revised Statutes, to any sum not exceeding ten hundred thousand dollars, and in the case of the increase of capital of the association each stockholder shall have the privilege of subscribing for such number of shares of the proposed increase of the capital stock as he may be entitled to according to the number of shares owned by him before the stock is increased.

Sixth. The board of directors (a majority of whom shall be a quorum to do business) shall elect one of their number to be president of this association, who shall hold this office (unless he shall be disqualified or be sooner removed by a two-thirds vote of all the members of the board) for the term for which he was elected a director, and they shall have power to elect a vice-president, who shall also be a member of the board of directors, and to elect or appoint a cashier and such other officers and clerks as may be required to transact the business of the association; to fix the salaries to be paid to them, and continue them in office, or dismiss them, as in the opinion of a majority of the board the interests of the association may demand. They shall have power to define the duties of the officers and clerks of the association, to require bonds from them, and to fix the penalty thereof; to regulate the manner in which elections of directors shall be held, and to appoint judges of the elections; to provide for an increase of the capital of the association, and to regulate the manner in which such increase shall be made, and generally to do and perform all the acts that it may be legal for a board of directors to do under the Revised Statutes aforesaid; and they shall also have the power to make all by-laws that it may be proper and convenient for them to make under said Revised Statutes for the general regulation of the business of the association and the management and administration of its affairs, which by-laws may prohibit, if the directors shall so determine, the transfer of stock owned by any stockholder who may be liable to this association, either as principal, debtor, or otherwise, without the consent of the board.

11 Sections one and eleven of the by-laws of the bank, containing all therein material to this suit, are as follows:

SECTION 1. The regular annual meeting of the stockholders of this bank for the election of directors shall be held at its banking-house on the second Tuesday of January of each year between the hours of 10 and 4. Fourteen days' notice of the time and object of said meeting shall be given by the cashier by publication in some newspaper published in Boston. At said meeting three judges of the election shall be appointed, who shall hold and conduct the same, and who shall, after the election has been held, certify under their hands to the cashier the result thereof and the names of the directors elect.

SEC. 11. Whenever an increase of stock shall be determined upon it shall be the duty of the board to notify all the stockholders of the same and cause a subscription to be opened for such increase, and each stockholder shall have the privilege of subscribing for such number of shares of new stock as he may be entitled to subscribe for in proportion to his existing stock in the bank. If any stockholder should fail to subscribe for the amount of stock to which he may be entitled within a reasonable time, which shall be stated in the notice, the directors may determine what disposition shall be made of the privilege of subscribing for the new stock.

On the 13th day of September, 1881, the capital stock of the bank was $500,000, divided into 5,000 shares of the par value of $100 each, of which shares the defendant, as trustee under the will of Augustus Aspinwall and guardian under the will of Thomas Aspinwall for the benefit of his son, William H. Aspinwall, a minor, held fifty, which stood in his name as guardian and trustee on the books of the bank, a certificate of said shares having been taken in the same way.

The following is a copy of the certificate so held by the defendant:

12 "50 shares.

The Pacific National Bank of Boston, Massachusetts.

This certifies that William Aspinwall, guardian and trustee, is proprietor of fifty shares in the capital stock of the Pacific National Bank of Boston, Mass; transferable only on the books of the said bank in person or by attorney on surrender of this certificate.

Boston, January 1, 1880.

A. I. BENYON, *President.*

F. J. CHICK, *Cashier.*"

September 13, 1881, the directors of the bank passed the following vote:

"Voted, That the capital of this bank be increased to one million dollars, and that stockholders of this date have the right to take the new stock at par in an amount equal to that now held by them."

The following notice was thereupon sent to all the stockholders of the bank:

"A. I. Benyon, president. J. M. Pettengill, cashier.

Pacific National Bank, 105 Devonshire street.

BOSTON, *Sept*, 13, 1881.

At a meeting of the directors of this bank held this day it was—

Voted, That the capital of this bank be increased to one million dollars, and that the stockholders of this date have the right to take the new stock at par in equal amounts to that now held by them.

13 Subscription to the new stock payable October 1st. Parties desiring to anticipate payment will be allowed interest to that date at four per cent. per annum.

J. M. PETTENGILL, *Cashier.*

At the bottom of this printed notice there was left a space and lines indicated for stockholders to write therein their subscriptions to the new stock to which they were entitled. Other than this there was no subscription paper opened. Some stockholders signified their assent on the notice in the place indicated at the bottom and sent it to the bank. Others did not, but went or sent to the bank and paid the money for the new stock to which they would be entitled in the proposed increase, taking receipts in the printed form prepared for that purpose.

The defendant received said notice, and thereupon went to the bank and informed A. I. Benyon, its president, that he had not sufficient funds in his hands as guardian and trustee with which to take as such the fifty shares in the proposed increase, and that he should therefore subscribe for and take the same himself individually. The president of the bank said that he could do so. The defendant afterwards returned to the bank the said notice received by him with the following subscription written at the bottom thereof signed by him:

"I will take the fifty new shares to which I am entitled and will pay for them as above.

WILLIAM ASPINWALL."

14 Subsequently, on October 1st, 1881, the defendant went to the bank and paid the sum of five thousand dollars, receiving therefor a receipt, a copy of which is as follows:

"Pacific National Bank.

$5,000. BOSTON, *October 1st*, 1881.

Received of William Aspinwall five thousand dollars on account of subscription to new stock.

J. M. PETTENGILL, *Cashier.*"

The defendant was well acquainted with Mr. Benyon, seeing him almost daily, and he did some business with the bank.

At the time the defendant paid this money and took this receipt he asked Mr. Benyon, the president of the bank, if there was any of the new stock that had not been taken, stating that if that were the case he, the defendant, would like to take some more of the new stock. The president of the bank replied that all the new stock had been taken, and that the defendant could not have any more than fifty shares already subscribed for and taken. Defendant desired his certificate, but was told that he could only have a receipt, as they were not in a position to issue certificates. The defendant believed this statement of the president of the bank, that all the new stock had been taken, to be true, but he was not told that all the money had been paid for the new stock.

Payments for new stock in the proposed increase of $500,000 were made to the amount of $330,100 on and prior to October 1st, 1881, sub-

sequent to which time additional payments were made until
15 November 15, 1881. The total amount thus paid in for new stock was $461,300. A schedule of said payments and the dates of the same is hereto annexed, marked "Exhibit A."

The money thus paid in up to October 1 was deposited in a separate account in the bank to the credit of its cashier as trustee, and the $330,100 which thus stood to his credit as trustee October 1 was then carried to the account of "new capital stock" on the books of the bank, to which account all sums subsequently paid on account of stock in the proposed increase were credited, and all the money thus paid in was used in the general business of the bank. Only $461,300 was ever paid to the bank on account of the proposed increase of $500,000. No notice was ever transmitted to the Comptroller of the Currency of the payment of such proposed increase of $500,000, and the Comptroller never certified his approval of such increase or the payment thereof, nor of any increase except as herein stated.

The president and cashier of the bank began to issue certificates for stock in the said proposed increase in the form hereinafter given in case of defendant on October 1, 1881, and thereafter issued them from time to time as called for to those who had paid, and on November 18, 1881, the day of the failure of the bank, certificates representing all but three hundred and fifty-four shares of the $461,300 had been thus delivered, and certificates for these were made and executed ready for delivery and the shares credited to the accounts of the respective parties on or as of October 1, 1881, on the stock ledger of the bank. The books of the bank also show that three hundred and fifty shares represented by certificates thus
16 issued in the said proposed increase had been transferred to third parties, the original certificates surrendered to the bank, and new ones issued therefor prior to November 18, 1881. A certificate, of which the following is a copy, was made out by the bank:

"Fifty shares.

Pacific National Bank of Boston, Mass.

This certifies that William Aspinwall, of Brookline, is proprietor of fifty shares in the capital stock of the Pacific National Bank of Boston, Mass.; transferable only on the books of said bank in person or by attorney on surrender of this certificate.

Boston, October 1, 1881. A. I. BENYON, *President.*

J. M. PETTENGILL, *Cashier.*"

The bank kept a book, called a stock ledger, in which it entered the names of the stockholders, their places of residence, and the number of shares held by each in a debit and credit account.

An entry of fifty shares to the credit of William Aspinwall appears to have been made in this stock ledger, of which the following is a copy:

"William Aspinwall, of Brookline.

October 1st, 1881. By fifty shares---------- $5,000."

At what time this certificate and entry were made does not appear except by the books. The stock ledger shows that the amount of capital stock as credited to the respective parties named
17 therein in a credit and debit form as aforesaid was on November 18, 1881, $961,300, and so remained to May 22, 1882, the entry as to said defendant being the same at the latter date as made originally as aforesaid. This ledger contained among the credits the shares of stock issued to and purchased by the parties named therein, and among the debits the shares of stock sold and transferred by them. The defendant called at the bank and took this certificate November 5, 1881.

On the eighteenth day of November, 1881, said bank became unable to meet its debts and liabilities, suspended payment thereof, failed to redeem its circulating notes, and thereupon closed its doors to business.

Daniel Needham, a duly appointed examiner of national banks, having made an examination of said bank, reported its condition to the Comptroller of the Currency on said eighteenth day of November, 1881, and was placed in charge and possession of said bank and all its funds, assets, records, and books by said Comptroller. Said bank remained under the exclusive charge and in the possession of said Needham, with its doors closed to business, until on or about March 18, 1882, the directors thereof having in the meantime no possession or control over the assets of said bank or the moneys received or paid out on account of the bank except under the supervision, control, and authority of said examiner.

In his report made to the Comptroller of the Currency by Examiner Needham on or about the eighteenth day of November, 1881, he stated, under the head of liabilities, the capital stock as follows:

Capital stock paid in----------	500,000 00
New " "----------	461,370 00

The directors passed this vote:

"NOVEMBER 19, 1881.

Voted, That Col. Needham be requested to make a thorough examination of the bank and report to the directors.

Voted, That Messrs. Coleman, Shepard, and Whitaker be
18 an executive committee to aid the bank examiner in the examination of the security of the bank, with full power.

Attest: J. M. PETTENGILL, *Cashier.*"

December 8, 1881, the directors appointed a committee to go to Washington to confer with the Comptroller of the Currency. Said committee went to Washington in December, 1881, before the vote of the directors of December 13, 1881, was passed, and had an interview with the Comptroller of the Currency in relation to the affairs of the bank. The fact that a vote had been passed in Sep-

tember previous to increase the capital to a million dollars, and that the full amount of that increase had not been subscribed for or paid in when the bank failed, in November, was talked over in that conversation. It was discussed with the Comptroller as to what should be done in view of the facts and as to what should be regarded as the capital of the bank, and the conclusion of the matter was that such a vote as that of December 13, 1881, should be passed by the directors; that the Comptroller should then be notified that the capital had been increased by the sum which had in fact been paid in, and that he should thereupon issue his certificate of increase to the bank to that amount. Upon the report of said committee to the board of directors of their interview with the Comptroller of the Currency the directors of the bank, on December 13, 1881, passed the following vote, viz.:

19 "Voted, That whereas it was voted by this board on the thirteenth day of September last that the capital of this bank be increased to one million dollars, and that stockholders of this date have the right to take the new stock at par in equal amount to that held by them;

And whereas the stockholders were duly notified of said vote, and also that subscriptions to the new stock would be payable Oct. 1;

And whereas $461,300 of said new stock has been taken and paid in;

And whereas $38,700 thereof has not been taken and paid in:

Voted, That said $38,700 of said stock be, and is hereby, cancelled and deducted from said capital stock of $1,000,000, and that the paid-up capital stock of this association amounts to $961,300.

Voted, That the Comptroller of the Currency be notified that the capital of this association has been increased in the sum of $461,300, and that the whole amount of said increase has been paid in as part of the capital of this association, and that he be requested to issue his certificate of said increase to this association according to law."

Letters, copies of which are annexed, marked Exhibits "C" and "D," were written and sent on the days of their respective dates.

After November 18, 1881, no more of the new stock or the rights thereto could be sold at par. December 13, 1881, J. M. Pettengill, cashier of said bank, acting under the direction of said directors, sent the following certificate to the Comptroller of the Currency, sworn to by the cashier, viz:

Pacific National Bank of Boston.

DECEMBER 13, 1881.

To the Comptroller of the Currency, Washington, D. C.:

It is hereby certified that the capital stock of "The Pacific National Bank of Boston" has been increased, pursuant to the articles of association of said bank, in the sum of four hundred and sixty-one thousand three hundred dollars, all of which has been paid in, and that the paid-up capital stock of said bank now amounts to nine hundred sixty-one thousand three hundred dollars.

[SEAL.] J. M. PETTENGILL, *Cashier.*

Upon the receipt by the Comptrolier of a copy of the vote of December 13th and the certificate of the cashier of December 13th the Comptroller sent, December 16th, 1881, to the directors of the bank the following certificate:

20 TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, *Dec.* 16, 1881.

Whereas satisfactory notice has been transmitted to the Comptroller of the Currency that the capital stock of "The Pacific National Bank of Boston, Mass.," has been increased in the sum of four hundred and sixty-one thousand three hundred dollars in accordance with the provisions of its articles of association, and that the whole amount of such increase has been paid in:

Now, it is hereby certified that the capital stock of "The Pacific National Bank of Boston, Mass.," aforesaid has been increased as aforesaid in the sum of four hundred and sixty-one thousand three hundred dollars; that said increase of capital has been paid into said bank as a part of the capital stock thereof, and that the said increase of capital is approved by the Comptroller of the Currency.

In witness whereof I hereunto affix my official signature.

[SEAL.] JOHN J. KNOX,
Comptroller.

At a meeting of the directors held December 14th, 1881—present, Messrs. Coleman, Sewall, Ray, Dyer, Shepard, Springer, Fowle, Sanborn, and March—the following resolutions were adopted and a copy sent to the Comptroller, viz:

21 Whereas on the 18th day of November, 1881, it was discovered that the Pacific National Bank was unable to pay on demand its liabilities to depositors and creditors;

And whereas since the date named the directors, assisted by Col. Daniel Needham, national bank examiner, and Wm. J. Best, have been engaged in an investigation to determine the liabilities and assets of said bank;

And whereas said investigation enables said directors to fix the apparent liabilities at $6,774,633.60 and the assets at the par or nominal value of $6,782,558.53, showing an apparent excess of assets over liabilities to the amount of $7,924.93;

And whereas said assets are not now worth their par or nominal value, but would probably realize in cash, with judicious management, $5,308,895.34, which would leave an apparent deficiency of $1,465,738.26;

And whereas in the adjustment of the account of the Pacific National Bank with the Central National Bank the latter has agreed, in the event of the reorganization of the Pacific National Bank, to yield of its alleged claims against the former the sum of $315,400, and has also agreed to return to the Pacific National Bank good assets of said bank, now held by said Central National Bank as col-

lateral, to the amount of $55,252.55, thereby reducing the deficiency of the Pacific National Bank to $1,095,085.71;

And whereas, with such knowledge of the affairs of said Pacific National Bank as the directors have been able to obtain by diligent investigation and inquiry, they are of opinion that it should immediately be reorganized in order fully to protect all of the interests involved;

And whereas the larger part of the assets of said bank consists of notes and bills discounted, of which a considerable portion could not now be converted into money without sacrificing the interests of the creditors of the association;

And whereas T. C. Weeks has returned to this bank $150,000 of its checks and has agreed to return $350,000 of additional checks in a few days: Therefore,

Resolved, That in the opinion of the directors of said bank the interests of both creditors and stockholders require its early reorganization.

Resolved, That the Comptroller of the Currency be requested to authorize the stockholders of the association to levy an assessment of 100% upon the par value of the capital stock now paid in, viz., $961,300, upon condition that said Weeks shall return to this bank $350,000 additional checks, as agreed, before said assessment shall be made.

Resolved, That in the event said bank shall be reorganized and shall resume business, with the approval of the Comptroller of the Currency, the board of directors will, and they do hereby, guarantee the payment of $133,785.71 out of the assets by them classed as "doubtful" and "bad," aggregating the sum of $1,473,663.19, and now treated by said directors as possessing no present money value, the condition of said guarantee being that it will cease and
22 determine so soon and so far as the said sum of $133,785.71 shall have been realized from said "doubtful" and "bad" assets, and said directors shall be held only for so much of said sum of $133,785.71 as may not be realized from said "doubtful" and "bad" assets.

Resolved, That in the opinion of said directors said assessment upon the stock of said association and the said guarantee of $133,785.71 will place said association upon a sound financial basis. Nevertheless, as time will be required to properly convert the assets of the association, which consist chiefly of notes and bills discounted, it is to the interest of the depositors and creditors to agree to a reasonable extension of time for the payment of their several claims. Recognizing this fact, the Central National Bank has agreed to give an extension of one year from Jan. 1, 1882, on the whole amount of its claim as compromised, viz., $500,000, at 4% per annum.

Resolved, That a copy of these resolutions be forwarded to the Comptroller of the Currency and his approval asked of the scheme *or* reorganization herein set forth, and that he grant the directors until Jan. 15th, 1882, to perfect said scheme *or* reorganization.

There was no vote of the stockholders of said association passed relating to increase or reduction of its capital stock unless the vote

of January 10, 1882, was such. On the 16th day of December, 1881, the Comptroller of the Currency sent to the bank the following communication, namely:

23 WASHINGTON, *Dec.* 16, 1881.

The Pacific National Bank of Boston, Massachusetts:

The entire capital stock of the Pacific National Bank of Boston, Massachusetts, amounting to nine hundred and sixty-one thousand three hundred (961,300) dollars, having been lost, notice is hereby given to said bank, under the provisions of section 5205 of the Revised Statutes of the United States, to pay the deficiency in its capital stock by an assessment of one hundred (100) per cent. upon its shareholders *pro rata* for the amount of capital stock held by each, and that if such deficiency shall not be paid and said bank shall refuse to go into liquidation, as provided by law, for three months after this notice shall have been received by it a receiver may be appointed to close up the business of the association according to the provisions of section 5234 of the Revised Statutes of the United States.

In testimony whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the Treasury Department, in the city of Washington and District of Columbia, this sixteenth day of December, A. D. 1881.

[SEAL.] JOHN JAY KNOX,
Comptroller of the Currency.

It does not appear that any communication was made to the defendant by the bank with reference to said votes of the directors of December 13 and 14 or the certificates of the Comptroller of December 16 or with reference to any change in the proposed increase in the capital of the bank to one million dollars. The defendant never saw nor had communicated to him the books of the bank or their contents. He was in the bank almost daily and knew of the suspension on November 18, 1881. He does not remember or believe that he had knowledge of the proposed change or the change made in the proposed increase of the stock of $500,000 and of the certificate of the Comptroller of December 16, 1881, until informed of the facts during the stockholders' meeting of January 10, 1882, or possibly on that day just before the meeting was organized and after the stockholders were assembled for the same, when he learned them.

24 The directors, on December 19, 1881, voted to call the annual meeting of the stockholders to be held January 10, 1882, and the following notice was printed in the newspapers published in Boston and sent to each stockholder:

"Pacific National Bank.

The annual meeting of the stockholders of this bank for choice of directors and for any other business that may legally come before

them will be held at their banking-rooms, 105 Devonshire street, on Tuesday, Jan. 10, 1882, at 11 o'clock a. m.

J. M. PETTENGILL, *Cashier.*"

The material portion of the record of said meeting is annexed as Exhibit "E."

At this meeting the examiner made a report of the condition of the bank, a board of directors was chosen, and, after a statement by the counsel of the bank of the facts relating to the increase of its capital stock, and as to how much had in fact been paid in under the vote to increase to one million dollars, and of the legal result thereof, and of the vote of December 13, and the certificates of the Comptroller of the Currency, dated December 16, and after a full discussion of the matter, the following vote was adopted by stock vote, 5,494 shares in favor and 55 shares against:

Voted, In accordance with the notice of the Comptroller of the Currency, dated Dec. 16, 1881, there be, and hereby is, laid an assessment of one hundred per cent. upon the shareholders of
25 the Pacific National Bank of Boston, Mass., *pro rata* for the amount of capital stock of said bank held by each shareholder.

Voted, That the board of directors notify each shareholder of said assessment and collect the same forthwith.

Notice of this vote was sent to the stockholders.

The defendant attended said meeting of the shareholders, acting as the holder of and representing only the fifty shares of original stock held by him as trustee and guardian, and as such voted in the negative on the question of the assessment, expressly stating on his ballot that he voted as the holder of fifty shares of old stock held by him as trustee and guardian. The defendant did not vote or in any way act at said meeting as the holder of any new stock, intentionally refraining from voting on the fifty shares of alleged new stock, not believing it to be valid stock.

At said meeting of January 10th the defendant or his attorney notified the attorney of the bank, who was present and acting at said meeting as such, and through him the directors of the bank, that he, the defendant, did not consider himself a holder of any shares in the alleged increase of $461,300; that that was his position in the matter.

April 28, 1882, the defendant paid the assessment voted January 10, 1882, on the fifty shares of original stock held by him as guardian and trustee, using his own personal funds to make such payments, but did not pay any assessment *or* any new stock.
26 The defendant knew on and after January 10, 1882, that by not paying such assessment the fifty shares of new stock would be sold, and that he would thereby be deprived of any benefit therefrom.

The defendant's action in not voting on the said fifty shares at the meeting of January 10th and his refusal to pay any assessment thereon was under the advice of counsel whom he consulted from time to time after the meeting of January 10th.

On May 16, 1882, the defendant again consulted other counsel about bringing suit, and the form of demand upon the bank for said money was determined upon.

The sum of $742,800 was paid to the bank on the assessment voted January 10.

On March 18, 1882, by permission of the Comptroller of the Currency, on representations to the effect that the bank was then solvent, the directors took possession of the assets of said bank, opened its doors to business, and continued to do a general banking business, loaning money, receiving and paying deposits, and paying debts and expenses, until the twentieth day of May, 1882, but made no losses on new loans during that period.

Creditors to the amount of $2,104,931.26 signed an agreement of extension before March 18, 1882, a copy of the agreement of extension being annexed, marked "Exhibit F."

A circular was sent to the depositors, a copy of which is annexed, marked "Exhibit G."

New debts and liabilities were incurred by the bank after March 18, 1882, and which were outstanding on May 22, 1882, to the extent of $200,000.

27 On or about April 21, 1882, the following notice was sent to all those who had not paid the assessment voted January 10:

Lewis Coleman, president. (2373.) E. C. Whitney, cashier.

The Pacific National Bank, No. 105 Devonshire St., directly opposite post office.

BOSTON, *April* 21, 1882.

In December last a notice was received from the Comptroller of the Currency, of which the following is a copy:

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, *Dec.* 16, 1881.

To the Pacific National Bank of Boston, Massachusetts:

The entire capital stock of the Pacific National Bank of Boston, Massachusetts, amounting to nine hundred and sixty-one thousand three hundred ($961,300) dollars, having been lost, notice is hereby given to said bank, under the provisions of section 5205 of the Revised Statutes of the United States, to pay the deficiency in its capital stock by an assessment of one hundred (100) per cent. upon its shareholders, *pro rata*, for the amount of capital stock held by each, and that if such deficiency shall not be paid and said bank shall refuse to go into liquidation, as provided by law, for three months after this notice shall have been received by it, a receiver may be appointed to close up the business of the association, according to the provisions of section 5234 of the Revised Statutes of the United States.

In testimony whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the Treasury Department, in the city of Washington and District of Columbia, this sixteenth day of December, A. D. 1881.

[SEAL.] JNO. JAY KNOX,
Comptroller of the Currency.

In pursuance of the foregoing notice the following vote was passed at the annual meeting of the stockholders held Jan. 10, 1882:

Voted, In accordance with the notice of the Comptroller of the Currency, dated Dec. 16, 1881, there be, and hereby is, laid an assessment of 100 per cent. upon the shareholders of the Pacific National Bank of Boston, Mass., *pro rata*, for the amount of capital stock of said bank held by each shareholder.

Voted, That the board of directors notify each shareholder of said assessment and collect the same forthwith.

More than three months having elapsed since you were notified of said assessment, and the same not having been paid, you are hereby notified that unless said assessment shall be paid on or before April 28, 1882, notice of the sale of your stock at public auction will be published in a newspaper of the city of Boston and posted in the office of this bank, and your stock will be sold according to law on Wednesday, the thirty-first (31) day of May, 1882.

E. C. WHITNEY, *Cashier.*

28 The defendant received this notice. On April 28, 1882, and thereafter the fifty shares of new stock on which this suit is based, together with the others on which the assessment had not been paid, were advertised to be sold at public auction in the Boston Journal and other Boston newspapers, said sale to take place May 31st, 1882. The defendant saw and knew of such advertisement, but took and intended to take no action to prevent such sale.

On May 22, 1882, the defendant delivered to the cashier of the bank and left with him a written demand, with the certificate, which was delivered to the defendant November 5, 1881, thereto attached. A copy of said demand is hereto annexed, marked "Exhibit B."

On May 30, 1882, the defendant brought suit against the bank to recover the $5,000 paid October 1, 1881, which suit is still pending.

On May 20, 1882, the directors voted to go into liquidation, and that the bank be closed to business, and appointed a committee to go to Washington and confer with the Comptroller of the Currency, recommending the cashier for appointment as receiver, if any was to be appointed. The committee went accordingly on that day. At 3 o'clock p. m. on that day the bank was closed to business and did not open for business thereafter.

On May 22 Linus M. Price, the original plaintiff in this case, was appointed receiver of the bank by the Comptroller of the Currency, and on May 23 he appeared in Boston and the assets and the bank passed into his hands to be wound up, with liabilities of about $2,500,000, exclusive of the capital stock, and assets worth about
29 $500,000. Said Price remained in charge of the bank, its assets, books, papers, and records, for the purpose of liquidat-

ing its affairs until March 18, 1886, when Peter Butler was appointed receiver, and has ever since been and now is in charge of said bank, its assets, books, papers and records, for the purpose of liquidating its affairs.

All the assets which were in the bank November 18, 1881, came into the receiver's hands when he took possession of the bank, except such as had been collected and applied to the payment of the debts and expenses of the bank and such as have been surrendered on compromise in settlement of doubtful assets.

The court finds that the board of directors and the Comptroller of the Currency acted in good faith and without fraud in the premises.

LE BARON B. COLT,
Circuit Judge.

EXHIBIT A.

List of Payments on Account of New Stock from September 1 to November 18.

1881.		
Sept.	15	1,500 00
	16	5,000 00
	17	2,100 00
	19	3,300 00
	20	1,000 00
	21	500 00
	22	1,600 00
	23	3,000 00
	24	1,600 00
	27	5,700 00
	28	16,500 00
	29	53,300 00
	30	42,800 00
Oct.	1	192,200 00
	3	30,700 00
	4	21,273 87
	5	10,326 13
	6	1,770 00
	Carried f'w'd	
	Brought f'w'd	
Oct.	7	2,000 00
	8	16,000 00
	10	7,800 00
	11	1,000 00
	12	400 00
	14	3,000 00
	15	7,500 00
	17	1,000 00
	18	1,000 00
	21	1,000 00
	22	500 00

Oct.	25	2,100 00
	27	13,500 00
	28	4,000 00
Nov.	3	400 00
	7	5,000 00
	11	500 00
	15	500 00
		$461,370 00

30 EXHIBIT B.

BOSTON, *May* 22, 1882.

To the Pacific National Bank of Boston, in the State of Massachusetts, its president, directors, and shareholders:

I hereby demand of you the sum of $5,000, with interest thereon from October 1, 1881, on which day said sum was paid by me into the funds of said bank upon my subscription for fifty shares of the new or additional capital stock in said bank, which additional capital, to the amount of $500,000, was authorized (as alleged) by a vote of the directors on or about Sept. 15, 1881.

This demand is made because my subscription and payment for said shares were obtained by fraudulent misrepresentations and concealments by the said board of directors of the actual condition of the affairs of said bank existing at the time when the issue of said additional stock was authorized and when my subscription was obtained and my payment received.

And also because there have since been fraudulent concealments of facts tending to invalidate and actually invalidating the issue of said stock, and because of alteration in the conditions upon which said subscription was made, which alterations were concealed from me and have never been assented to by me.

And also because the provisions of law under which alone said additional stock could be lawfully created and issued have not been complied with, and said pretended capital stock has not been lawfully created and issued, and cannot be so created and issued.

31 This certificate (No. 730) for said fifty shares of stock which I received upon said subscription and payment is herewith returned in avoidance of my said subscription and as a surrender of my right to hold said stock so fraudulently and unlawfully issued.

WILLIAM ASPINWALL.

EXHIBIT C.

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, *December* 13, 1881.

SIR: I had a conference with the committee who arrived here yesterday in reference to the affairs of the Pacific National Bank.

It is proposed to make an assessment for the full amount of the

stock of the bank, and it is believed that when this is paid up the capital stock will be unimpaired and the bank in possession of abundant funds to meet all their obligations.

I request that you will immediately on receipt of this letter write me in reference to the present condition and prospects of the bank and if you see any reason to doubt its ability to resume business, as proved.

Very respectfully, JNO. JAY KNOX,
Comptroller.

Daniel Needham, Esq., nat. bank examiner, 45 Milk street, Boston, Mass.

32 EXHIBIT D.

Office Daniel Needham, National Bank examiner, 45 Milk street.

BOSTON, *Dec. 14th*, 1881.

SIR: Your letter of the 13th is at hand. In reply to your inquiry I will say: If Weeks will pay in on his unsecured loans five hundred thousand dollars, as has been proposed, and the arrangement with the Central National Bank with reference to the adjustment of the disputed claim is perfected, and an obligation is given by the directors guaranteeing a certain amount of doubtful paper, which amount is stipulated in the resolution, a copy of which, after its passage, will be immediately forwarded to you by the board, then an assessment of one hundred per centum on the present capital of the bank, as it now stands on the books, would, in my judgment, make the bank solvent.

Many of the directors have the full confidence of the public, and under the conditions I have specified above I should have no doubt of the full ability of the bank to resume.

In speaking of the present capital upon which assessment must be made I mean the old $500,000, together with the new $461,300, making subject to assessment $961,300. In my judgment, it is most important that the bank should be revived if possible.

If it falls the Central National must also fall, and the wide-spread injury could not be estimated.

I am gratified to say that the condition of the bank has been strengthened since it has been in my charge by the securing of some questionable debts, and careful management will undoubtedly save to the bank a large amount which would otherwise be lost.

If the bank goes on upon the plan now laid out, and which will be presented to you for approval within two or three days, and which embodies the features noted in this letter, then there must be a delay of some weeks, and I would like your approval to place my clerk in charge during more or less of the temporary absence I may make in continuing my work of examinations elsewhere.

Very respectfully, DANIEL NEEDHAM,
Nat. Bank Examiner.

To Hon. John J. Knox, Comptroller of the Currency, Washington, D. C.

33 EXHIBIT E.

Queries.

A STOCKHOLDER: Do you know how the bank stood when the directors voted to double its capital?

Mr. BEST: I am not able to answer that question. I had no connection with the bank until about the 28th of November, ten days after the failure. My only relation previous to that time was that of its largest depositor. The money now here in my own name and in the name of a corporation of which I am president amounts to about $260,000 or $270,000.

Q. Over what period does this indebtedness run?

Mr. BEST: I think some losses of the bank originated in transactions made several months previous to the vote for increasing the stock, but the transactions have been fully described by Col. Needham. They were carried not upon the books of the bank, but in the head of its president and in the memorandum which the cashier himself kept. There is not an entry upon any of the books of the association of $1,262,500 indebtedness which stood in the name of one of its debtors on Nov. 18.

Q. But in the paper which the bank held, in your examination, of course, you had to see the date upon that paper and you know, consequently, about what dates or for what dates the bank took that paper. Have you any doubt that this bank was insolvent at the time it voted for the increase of its capital stock?

Mr. BEST: That is a question I cannot answer. I have only addressed myself to ascertaining the bank's condition on the 18th of November.

34 Q. That question has not, then, been looked into by you at all?

Mr. BEST: No, sir; I have only addressed myself to the one date, Nov. 18.

ANOTHER STOCKHOLDER: I understand many small stockholders are not able to meet this assessment. What is to become of them?

Mr. BEST: I am at a loss to know how to answer that question. I am not myself a stockholder, but should the bank go on I am likely to be. The law prescribes that when an assessment is ordered three months shall be given within which to make payment. If payment shall not be made then, the law provides that a notice of thirty days shall be given, and unless payment be made at the expiration of that time the stock would then be sold. I think, however, there are but few who will not be able to take care of the assessment, and I am hopeful—my hope being based upon such knowledge as I have been able to glean by my labors here—that before any of these small holders could be sold out the affairs of the bank will be in such condition that they can themselves raise the money for the assessment without difficulty.

Q. I desire to know whether the cashier has not given a bond; and, if so, for how much, and whether his securities are good.

Mr. BEST: It was intended that the cashier should have given a bond (laughter), and I have reason to believe that a bond was drawn, and that the directors were of the opinion that it was executed; but since the suspension it has been found that the bond was not executed. The cashier, therefore, cannot be held responsible in any sum whatever on that account.

Q. What provisions are there in the organization of the bank under the original charter or articles of association for an increase in its capital?

Mr. BEST: Perhaps it would be better for the counsel of the bank to answer that question, as I am only a merchant. The articles of association must conform to the law, and the law, I believe, is explicit upon that point. The counsel of the bank, Mr. Stone, could make that matter much plainer than myself.

A stockholder called for the reading of the provision of the articles of association for increasing the capital stock, and Mr. Stone, the counsel for the directors, read from the fifth article that the capital should be $250,000, but may be increased, according to the provisions of sec. 5142 of the Revised Statutes, to any sum not exceeding $1,000,000; also sec. 11 of the by-laws, providing that whenever an increase of the stock shall be determined upon the directors shall notify all the stockholders, cause a subscription book to be opened, and if any stockholder fails to subscribe, the directors shall
35 determine what disposition shall be made of the remaining new stock unsubscribed for, and from the directors' records to show that $461,300 of new stock was subscribed for, represented either by certificates of stock actually issued or in receipts, on the surrender of which the parties who took them are entitled to their certificates and the remaining $38,700 unsubscribed was canceled; that the Comptroller of the Currency was notified and had issued his certificate that the increase of capital stock had been made according to law, which paper was read by Mr. Stone.

The call of the Comptroller for an assessment of one hundred per cent. on the capital stock was read, and the following was offered:

Voted, In accordance with the notice of the Comptroller of the Currency, dated Dec. 16, 1881, there be, and hereby is, laid an assessment of one hundred per cent. upon the shareholders of the Pacific National Bank of Boston, Mass., *pro rata* for the amount of capital stock of said bank held by each shareholder.

Voted, That the board of directors notify each shareholder of said assessment and collect the same forthwith.

J. H. Benton, Jr., called for a stock vote upon the question.

A running discussion ensued upon the expediency of passing the vote. Mr. McIntire, of East Cambridge, holding two shares, said it was a legal question whether the old stockholders could be assessed under the call. He wanted action postponed and a committee appointed to examine the accounts and report. He wanted to know whether the bank was solvent when he was induced to buy his stock. Later, when the roll was being taken, Mr. McIntire retired from the room, protesting against and declining to take part in the proceedings.

Mr. Hodges also thought the question should be settled whether the old stockholders could be assessed, and favored postponement.

Mr. Dole spoke in the same vein.

Several gentlemen spoke in favor of immediate action, among them J. F. C. Hyde, of Newton; Col. Alden, Capt. Watts, of Maine, and Henry D. Hyde, all agreeing that the only thing to be done was to vote and order the assessment as the best means of getting out of the difficulty and saving what they had invested.

In reply to the objections of Messrs. McIntire and Hodges, Mr. Stone stated that the assessment had been ordered by the Comptroller under the best authority at Washington, and its legality would have to be settled in the courts.

There were loud calls for "question," and some impatience manifested at the delay.

The stock vote was ordered, and the chair appointed J. H. Benton, Jr., Capt. Watts, Richard Stone, Jr., J. F. C. Hyde, and Dwight Chester a committee to collect and count votes. The ballot proceeded.

36 *The Assessment Ordered.*

The question of ordering the one hundred per cent. assessment upon all outstanding stock was carried by a practically unanimous vote.

The total vote represented some $600,000, out of which only about $10,000 was opposed to ordering the assessment.

Directors Elected.

The following directors were chosen by a stock vote of 4,727 shares against eighty scattering votes:

Lewis Coleman, of Boston; John Shepard, of Boston; M. Dyer; Jr., of Boston; M. P. Springer, of Newton; J. H. Whitaker, of Malden; Edwin Ray, of Newton; J. H. Sanborn, of Newton; E. M. Fowle, of Newton; George H. March, of Watertown; Arthur Sewall, of Bath; John E. Cassidy, of Boston; John Fallon, of Lawrence.

Present Condition of the Bank.

The following statement of the bank's condition Jan. 10, 1882 was submitted:

	Par value.	Estimated value.
Cash	$12,743 68	$12,743 68
U. S. bonds to secure circulation	500,000 00	500,000 00
Redemption fund	13,500 00	13,500 00
From banks and bankers	196,049 93	196,049 93
Bonds, mortgages, and stocks	273,500 00	249,000 00
Pledged to International Trust Company on account of $200,000 loan, not included under any other head	50,000 00	50,000 00

Cashier's account and cash items	145,038 90	93,250 49
Receiving teller's items	57,743 02	49,558 22
Notes and bills discounted, etc., including real-estate mortgages and stocks carried as loads	4,353,538 40	3,739,656 50
Overdrafts	26,539 55	10,000 00
Revenue stamps	1,000 00	1,000 00
T. C. Weeks, cash	135,000 00	135,000 00
Difference between estimated and par value		714,894 65
	$5,764,653 47	$5,764,653 47
Circulation		450,000 00

37 *Deposits and Creditors.*

A—Deposits subject to check	$1,060,615 10	
B—Certificates of deposit	1,728,762 53	
C—Due banks and bankers	1,679,189 97	
D—Rediscounts	685,589 61	
E—Unpaid dividends	435 00	
		$5,154,592 21
Stockholders		961,300 00
		$6,565,892 21

Recapitulation.

Assets, estimated value, as above		$5,049,758 82
Liabilities		6,565,892 21
Apparent deficiency		$1,516,133 39
Margin on loans in names of individuals	$25,000 00	
Premium on U. S. bonds, about	10,000 00	
Assessment	961,300 00	
Directors' guarantee fund	150,000 00	
Doubtful assets ($714,894.65)	369,833 39	
		$1,516,133 39

EXHIBIT F.

Pacific National Bank, 105 Devonshire street.

BOSTON, *January 2nd*, 1882.

We, the undersigned, creditors of the Pacific National Bank of Boston, in consideration of the embarrassed condition of said bank and the agreements of the other parties hereto herein contained, do hereby, for ourselves and our heirs, executors, and administrators, respectfully covenant and agree with said Pacific National Bank of Boston, its successors and assigns, that we will, and hereby do, extend the time of payment of our several claims as follows, to wit: One-third thereof to be paid in four months from January 1st, 1882;

one-third thereof to be paid in eight months from January 1st, 1882; one-third thereof to be paid in twelve months from January 1st, 1882; interest on each instalment to be paid therewith at the rate of four per cent. per annum; the bank to have the right to anticipate any or all of said instalments.

In witness whereof we have hereto set our hands and our common seal, adopted for this purpose only, this second day of January, one thousand eight hundred and eighty-two.

38 EXHIBIT G.

THE PACIFIC NATIONAL BANK, BOSTON,
March 16, 1882.

To our depositors:

By vote of the directors and the approval — the Comptroller of the Currency, the bank will reopen for business on Saturday, the 18th. Every effort has been made to put the bank again into a sound and solvent condition, and the stockholders have been called upon to pay an assessment of 100 per cent. on their stock, thus making the depositors' balances secure and available. The bank will be run on strict business principles and in the interest of its customers and stockholders, and, while thanking you for past favors, we solicit your confidence and support for the future.

LEWIS COLEMAN, *President.*
E. C. WHITNEY, *Cashier.*

39 It is thereupon considered by the court, to wit, February 14, 1888, that the said Peter Butler, receiver, plaintiff, recover of the said William Aspinwall, defendant, the sum of six thousand five hundred and fifty dollars damages and his costs of suit, taxed at —.

The following bill of exceptions is allowed by the court and is made part of the record in said cause:

Defendant's Bill of Exceptions. (*Filed Feb.* 14, 1888.)

Be it remembered that upon the trial of this action, the record of which is referred to as a part of this bill, the parties having filed a stipulation in writing with the clerk waiving a trial by jury, as appears by the record, the action was tried by this court, each party introducing evidence to maintain on his part the issue joined; whereupon the court found the facts specially, which said finding by the court is incorporated into and made a part of the record of this case and a part of this bill of exceptions.

And after the court had found the facts specially the defendant prayed the court to rule that "upon the facts found in this case the plaintiff is not entitled to judgment;" but the court refused this prayer, and found that the defendant was the owner of fifty shares of stock on May 20 and May 22, 1882, and entered judgment for the plaintiff for the sum of $6,550, as appears by the record; to which

refusal to rule, ruling, and entry of judgment the defendant then excepted; and the defendant insisting upon his exceptions
40 aforesaid, they having been duly taken, prayed the court that this his bill of exceptions be signed and allowed by the court.

The foregoing bill of exceptions is allowed.

LE BARON B. COLT,
Circuit Judge.

A true record.
Attest: JOHN G. STETSON, *Clerk.*

41 Circuit Court of the United States, District of Massachusetts.

PETER BUTLER, Receiver,
v.
WILLIAM ASPINWALL. } No. 2003 A, Law Docket.

Assignments of Errors. (*Filed April* 9, 1888.)

1. The court erred in ruling that the defendant was the owner of fifty shares of stock in the Pacific National Bank on May 20 and May 22, 1882.

2. The court erred in not ruling that the Comptroller of the Currency, having on December 16, 1881, under section 5205, R. S., made requisition upon the Pacific National Bank to restore its lost capital by means of an assessment upon the stockholders, was by law required to allow the bank the full period provided by law for collecting and making up said assessment, and was not authorized to appoint a receiver to wind up the business of the bank before the term provided by law for the completion of said process of assessment and collection had elapsed.

3. The court erred in not ruling that said Comptroller was not authorized to appoint such a receiver before the bank, as allowed by law, had time to go into liquidation and when it had not refused so to do.

42 4. The court erred in not ruling that, the appointment of a receiver in this case being unauthorized by law, all the subsequent proceedings under such receivership were of no validity and void.

5. The court erred in not ruling that owners of stock created on or after December 16,.1881, or January 10, 1882, could not be held liable for contracts, debts, and engagements entered into before said stock was created.

6. The court erred in ruling that the plaintiff was entitled to judgment and in entering such judgment for the sum of six thousand five hundred and fifty dollars ($6,550).

7. The court erred in ruling that the plaintiff was entitled to judgment in any sum and in not entering judgment for the defendant.

THOMAS H. TALBOT,
Of Counsel for Defendant.

43 The following is the opinion of the court in accordance with which judgment for the plaintiff was entered in the above-entitled cause:

Circuit Court of the United States, District of Massachusetts.

PETER BUTLER, Receiver, *v.* WILLIAM ASPINWALL. } No. 2003 (A), Law Docket.

Opinion of the Court. (*December* 13, 1887.)

COLT, *J.:*

This is an action at law heard by the court, jury trial having been waived. It is one of the numerous suits brought by the receiver of the Pacific National Bank against the stockholders under § 5151 of the Revised Statutes. The facts in this case differ somewhat from those before the court in Delano *v.* Butler, 118 U. S., 634, and therefore the defendant contends that the reasoning of the court in that case is inapplicable here. The main ground on which the court placed its decision in the Delano case was that the subsequent conduct of the stockholder, especially in the payment of the assessment of one hundred per cent. on the old as well as the new stock, for the purpose of allowing the bank to resume business, amounted to a ratification of the validity of the new stock. In the present case the defendant subscribed for the new stock on the proposed increase of $500,000 and received his certificate, but at the subsequent meeting of the stockholders, in January, 1881, when he is quite positive, but not certain, he learned for the first time that the actual increase of stock was $461,300 instead of $500,000, he protested by himself or through counsel, against the validity of the new
44 stock. Upon the old stock, which he held as guardian or trustee, he voted against the assessment. Upon the new stock, which was subscribed for in his own name, he refused to vote at all. His position, therefore, is that he subscribed to a proposed increase of stock which was never carried out, and that he has never, by implication or waiver, consented to the increase as finally approved. While the Supreme Court in Delano *v.* Butler decide the case on the ground of the subsequent conduct of the stockholder, amounting to a ratification of the act of the association and the Comptroller of the Currency in fixing the amount of the increase stock at a less sum, yet the court also say:

"It will be observed that, without waiting to see what the future action of the association and the Comptroller of the Currency might be on the question of the ultimate amount of the increased stock, the plaintiff in error paid for his shares and accepted his certificate. This he did in legal contemplation, with knowledge of the law which authorized the association and the Comptroller of the Currency to reduce the amount of the proposed increase to a less sum than that fixed in the original proposal of the directors, and such payment and

acceptance of certificates in accordance therewith might amount, under such circumstances, on his part to a waiver of the right to insist that he should not be bound unless the whole amount of the proposed increase should be subscribed for and paid in."

In the present case I am of opinion that the acceptance of his certificate by the defendant and the retention of the same during the period of reorganization and until after the bank finally passed into the hands of a receiver, in May, 1881, several months after all the facts were within his knowledge, amounted to a ratification on his part of the act of the association and the Comptroller of the Currency as to the increase of stock, and that he cannot now
45 come forward and assert that as to him the increase as finally made is invalid. In the case of Eaton *v.* Pacific National Bank, 144 Mass., 260, the facts were different, for in that case the plaintiff refused to accept her certificate of stock and demanded back her money. Judgment should be entered for the plaintiff, and it is so ordered.

Judgment for plaintiff.

46 UNITED STATES OF AMERICA, } *ss:*
Massachusetts District, }

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record in the cause entitled, No. 2003 A, law docket, Peter Butler, receiver, plaintiff, *v.* William Aspinwall, defendant, lately determined in said circuit court, and of all proceedings therein and of the opinion of the court and of the assignment of errors filed therein.

Seal of the Circuit Court, Massachusetts.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this second day of July, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundredth and twelfth.

JOHN G. STETSON, *Clerk.*

47 (*Bond on Writ of Error.*)

Know all men by these presents that we, William Aspinwall, of Brookline, in the district of Massachusetts, as principal, and Thomas Aspinwall and William Henry Aspinwall, both of said Brookline, as sureties, are held and firmly bound unto Peter Butler, of Boston, in said district, receiver of the Pacific National Bank of Boston, in the full and just sum of ten thousand dollars, to be paid to the said Peter Butler, receiver, his certain attorneys, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the twenty-third day of February, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, at a circuit court of the United States within and for the district of Massachusetts, in a suit depending in said court between the said Peter Butler, receiver, plaintiff, and the said William Aspinwall, defendant, judgment was rendered against the said defendant, and the said defendant having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiff, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said defendant shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

WILLIAM ASPINWALL. [L. S.]
THOMAS ASPINWALL. [L. S.]
W. H. ASPINWALL. [L. S.]

Signed, sealed, and delivered in presence of—

A. M. STARKWEATHER,
Witness to W. A. & T. A.
ALFRED P. PAGE,
Witness to W. H. A.

Approved.
LE BARON B. COLT,
U. S. Circuit Judge.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest: JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

48 The United States of America to Peter Butler, of Boston, in the district of Massachusetts, receiver of the Pacific National Bank of Boston, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States within and for the district of Massachusetts, wherein William Aspinwall, of Brookline, in said district, is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Le Baron B. Colt, United States circuit

judge for the first judicial circuit, this twenty-third day of February, in the year of our Lord one thousand eight hundred and eighty-eight.

LE BARON B. COLT,
U. S. Circuit Judge, First Judicial Circuit.

Due and sufficient service of this citation is acknowledged.

A. A. RANNEY,
Attorney for Receiver.

Endorsed on cover: Massachusetts C. C. U. S. No. 957. William Aspinwall, plaintiff in error, *vs.* Peter Butler, receiver of the Pacific National Bank of Boston. Filed October 15, 1888.

Office Supreme Court, U. S.
FILED.
JAN 3 1890
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1889.

No. 957.

Submitted under Rule 20.

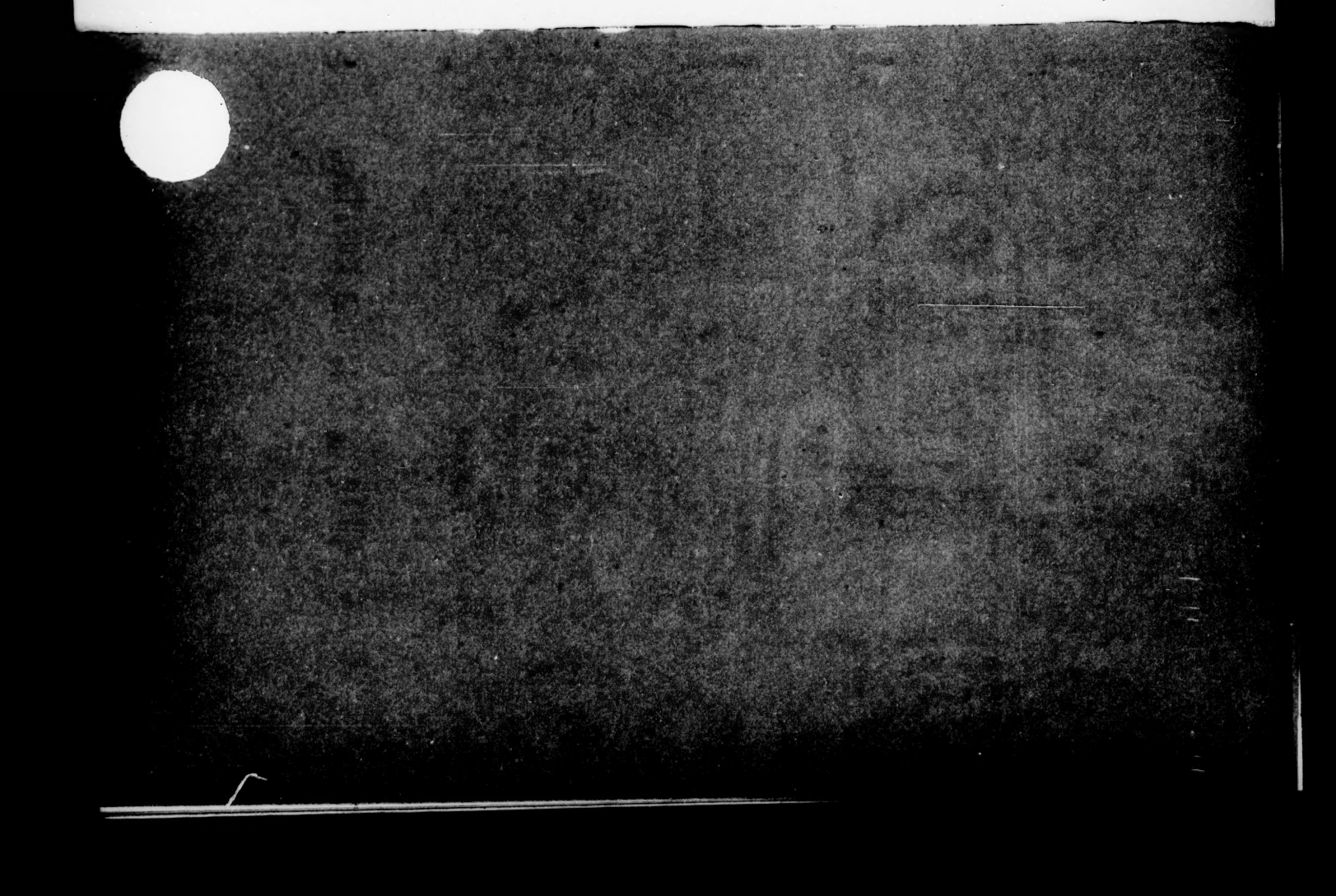
WILLIAM ASPINWALL, PLAINTIFF IN ERROR,

v.

PETER BUTLER, RECEIVER OF THE PACIFIC NATIONAL BANK OF BOSTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

ARGUMENT FOR PLAINTIFF IN ERROR BY BENJAMIN N. JOHNSON.



Supreme Court of the United States.

No. 957.

WILLIAM ASPINWALL, *Plaintiff in Error*,

v.

PETER BUTLER, *Receiver*.

ARGUMENT FOR WILLIAM ASPINWALL.

General Statement of the Case.

This was an action at law brought by the receiver of the Pacific National Bank of Boston to enforce the alleged personal liability of the defendant under Rev. Stats., Sect. 5151, to the extent of one hundred per cent on fifty shares of the capital stock of said bank.

The principal questions involved are the validity and ownership of those fifty shares. These questions arise out of an attempted increase in the capital stock of said bank a short time before the appointment of the receiver. The defendant contended in the Circuit Court, and as plaintiff in error here contends, that he never subscribed for or took any shares in the increase of stock, as finally made or attempted, but that his only connection with the bank was by virtue of his subscription to a proposed increase of stock which was never carried out. The fundamental question is whether by such subscription he became a stockholder in the bank.

The facts have been found specially by the Circuit Court. This finding of facts may be summarized as follows: —

Sept. 13, 1881, the Pacific National Bank had a capital stock of $500,000. On that day the directors voted to increase the stock by $500,000, to $1,000,000. A notice of this vote was at once sent to all the stockholders of the bank, inviting subscriptions to the proposed new stock, payable Oct. 1. The plaintiff in error was not personally a stockholder, but did at this time hold fifty shares as trustee and guardian for his son. In that capacity he received the notice of the vote of Sept. 13, and not having sufficient funds as guardian and trustee, he subscribed for the fifty shares in the proposed increase individually. This he did in writing at the bottom of the notice. The notice with the subscription returned by him to the bank, was as follows: —

PACIFIC NATIONAL BANK, 105 DEVONSHIRE ST.,
BOSTON, Sept. 13, 1881.

At a meeting of the directors of this bank held this day, it was

Voted, That the capital of this bank be increased to one million dollars, and that the stockholders of this date have the right to take the new stock at par in equal amounts to that now held by them. Subscription to the new stock payable Oct. 1. Parties desiring to anticipate payment will be allowed interest to that date at four per cent per annum.

J. M. PETTENGILL, *Cashier*.

I will take the fifty new shares to which I am entitled, and will pay for them as above.

WILLIAM ASPINWALL.

Oct. 1, 1881, the plaintiff in error paid the bank five thousand dollars, taking the following receipt: —

$5000. PACIFIC NATIONAL BANK, Oct. 1, 1881.

Received of William Aspinwall five thousand dollars on account of subscription to new stock.

J. M. PETTENGILL, *Cashier.*

At the time of this payment the president of the bank informed the plaintiff in error that all the new stock had been taken. This statement the plaintiff in error believed to be true. The president of the bank also stated at the same time that the bank was not yet in a position to issue certificates.

One month and five days after this payment and after these statements by the president of the bank, to wit, on Nov. 5, 1881, the plaintiff in error called at the bank and received from it what purported to be a certificate of fifty shares of its capital stock. Thirteen days after, on Nov. 18, 1881, the bank failed and closed its doors to business, and from that date to March 18, 1882, it was in the exclusive charge and possession of the national bank examiner, placed there by the comptroller of the currency.

When the bank failed Nov. 18, 1881, only $461,300 of the proposed increase in the capital stock of $500,000 had been taken or paid in. Only 461,300 was ever paid to the bank on account of the proposed increase of $500,000. No notice was ever transmitted to the comptroller of the currency of the payment of such proposed increase, nor did he ever certify his approval of such increase or the payment thereof.

On Dec. 13, 1881, while the bank was still closed, the directors of the bank voted to change the increase from one of $500,000 to one of $461,300. The comptroller was notified of all the facts and that only the $461,300 had been paid in and all this on account of the proposed increase of $500,000. On Dec. 16, 1881, he issued two certificates, one approving the newly devised increase of $461,300, the other certifying that all the capital stock of the bank amounting to $961,300 had been lost, and notifying the bank to make said capital good by an assessment of one hundred per cent upon the shareholders of the bank according to the provisions of Rev. Stats., Sect. 5205.

Not one of these votes or proceedings by the directors and comptroller was known to the plaintiff in error. He was not in any way notified or consulted, and he never learned what had been done or attempted until the annual meeting of the stockholders held Jan. 10, 1882.

The call and notice of this annual meeting gave as its object only "the choice of directors."

At this meeting a statement of the facts affecting the question of the capital stock was made, and a vote was passed levying upon the stock of the bank an assessment of one hundred per cent in accordance with the notice of the comptroller.

The plaintiff in error attended said meeting, acting as the holder of and representing only the fifty shares of original stock held by him as trustee and guardian, and as such voted in the negative on the question of the assessment, expressly stating on his ballot that he voted only as the holder of fifty shares of old stock held by him as guardian and trustee. The plaintiff in error did not vote or in any way act at said

meeting as the holder of any new stock, intentionally refraining from voting on the fifty shares of alleged new stock, not believing it to be valid stock. The plaintiff in error at that meeting notified the bank that he did not consider himself a holder in any shares in the attempted increase of $461,300, and that that was his position in the matter.

The action of the plaintiff in error in not voting on the alleged fifty shares at the meeting of Jan. 10, and his subsequent refusal to pay any assessment thereon, were under the advise of counsel whom he consulted from time to time after the meeting of Jan. 10.

On or about April 21, 1882, notice was sent by the bank to the plaintiff in error that unless he should pay on or before April 28, 1882, the one hundred per cent assessment voted at the annual meeting Jan. 10, his stock would be advertised for sale at public auction in a newspaper published in Boston, and posted in the office of the bank, and that said stock would be so sold on Wednesday, May 31, 1882.

On April 28, 1882, the plaintiff in error paid the assessment voted Jan. 10, 1882, on the fifty shares of original stock held by him as trustee and guardian, using his own personal funds to make such payment, but did not pay any assessment on any new stock.

The plaintiff in error knew on and after Jan. 10, 1882, that by not paying the assessment on the fifty shares of alleged new stock, the same would be sold and that he would thereby be deprived of any possible benefit therefrom.

On April 28, 1882, and thereafter, the alleged fifty shares of new stock on which this suit is based were advertised to be sold at public auction in the Boston *Journal* and other

newspapers, said sale to take place May 31, 1882. The plaintiff in error saw and knew of this advertisement, but took and intended to take no action to prevent such sale.

On May 16, 1882, the defendant consulted other counsel about bringing suit against the bank for the $5,000 which he had paid Oct. 1, 1881, on his subscription to the proposed increase of $500,000, and a form of demand upon the bank for said money was then determined upon.

In pursuance of such determination the plaintiff in error on May 22, 1882, delivered to the cashier of the bank and left with him a written demand for said money, and also the certificate which had been delivered to him by the bank Nov. 5, 1881.

The receiver was appointed on the same day, May 22, and took possession of the bank the following day.

On May 30, 1882, the plaintiff in error brought suit against the bank to recover the $5,000 paid Oct. 1, 1881, which suit is still pending.

Specification of Errors.

Upon this special finding of facts by the Circuit Court, the plaintiff in error prayed that court to rule that the receiver was not entitled to judgment. The court, however, refused so to rule, and ruled in effect that the acceptance by the plaintiff in error of the certificate received by him Nov. 5, 1881, and the retention of the same (notwithstanding all the other acts of dissent and repudiation on the part of the plaintiff in error) amounted in law to a ratification on his part of the act of the association and the comptroller of the currency as to the increase of stock, and made him liable as a stock-

holder in this action. Upon this ruling a judgment was entered for the receiver.

To this refusal to rule, ruling, and entry of judgment the plaintiff in error duly excepted, and has brought the case to this court upon a writ of error. He now urges that the Circuit Court erred in entering a judgment for the receiver upon the facts found by that court, and in not entering a judgment for the plaintiff in error thereon.

ARGUMENT.

I.

The plaintiff in error, as a subscriber for fifty shares in the proposed increase of five thousand shares, had a right to insist that he should not be bound, unless the whole amount of the proposed increase should be subscribed for and paid in, and was not bound by his subscription and subsequent payment to take any shares in the increase of 4,613 shares subsequently devised by the directors of the bank and approved by the comptroller.

The questions involved in this proposition were not passed upon in the case of Delano *v.* Butler, 118 U. S. 634, but were merely stated or suggested therein. They have since been fully considered and decided by the Supreme Judicial Court of Massachusetts in the case of Eaton *v.* Pacific National Bank, 144 Mass. 260. In that case the facts relating to the increase of stock and the circumstances of the subscription and payment were precisely like those in the present case, except that the subscription by the plaintiff in error in the case at bar was in writing. This difference is in his favor, since his written subscription must be held

to have been more precise and definite than the implied subscription accompanying the payment by the plaintiff in the Eaton case.

The reasoning of the Supreme Court of Massachusetts, in its opinion delivered in the Eaton case, need not be supplemented by any argument of ours. It discusses the questions there decided and here presented, clearly, learnedly, and conclusively.

Upon the principles laid down and established in that case the position of the plaintiff in error is as follows: —

He subscribed and paid for fifty shares in a definite proposed increase of five thousand shares. This increase was never carried out, but was abandoned.

This failure and abandonment of the only increase proposed by the bank to the plaintiff in error, and the only one to which he was a party, left him a creditor of the bank to the amount of his payment. His subscription was definite and conditional, and bound him to no other increase than the one contemplated by both parties at the time.

The vote of the directors of Sept. 13 was in the nature of a proposal to the stockholders to subscribe for five thousand shares of new stock and to pay in for it $500,000. It was necessary that the stock should all be taken and the money all paid in before the new stock could be created. It was a condition precedent to the issue of the new stock under this vote that both these things should be done, and that the comptroller should certify that they had been done, and approve the increase. The plaintiff in error paid in his money upon an implied condition that he should not be entitled to new stock unless $500,000 was paid in and the comptroller approved the increase, and also upon the im-

plied condition that he should not be required to take new stock unless the amount proposed was created.

The decision in Eaton *v.* Pacific National Bank is fully recognized and approved in the case of Winters *v.* Armstrong, 37 Federal Rep. 508.

The contention of the receiver that there is a settled rule in the Federal courts that in the case of a subscription to stock to be created there is no implied condition that there shall be a subscription for the whole increase, is without good foundation. In the case of Chubb *v.* Upton, 95 U. S. 665, Mr. Justice Hunt incidentally in the course of the opinion, and citing a case in the 21st of Barbour (N. Y.), says: "It is not necessary to sustain an action to recover the amount of stock of a person who has received a certificate thereof, that there should have been a subscription for the whole amount named in the articles." This dictum was unnecessary to the decision of the case, and was evidently so regarded by the court. The case in the Supreme Court of New York, 21 Barb. 56, which is cited by Mr. Justice Hunt as the foundation for his dictum, does not support it. It was held in that case, in passing upon a subscription to the stock of a plank road corporation, organized under the New York Corporation Act of 1847, that a subscription to the full amount of the stock named in the articles of such a company was not a condition precedent to the liability of the subscriber. It cited Hamilton Plank Road Company *v.* Rice, 7 Barb. 166, which case put the liability of the subscriber upon the construction of the Act of 1847, deciding in effect that that act did not make the subscription of a certain amount of stock a condition precedent, and that therefore the agreement of the defendant to pay "as soon as the amount of

stock required by said act should be subscribed" could be enforced, although the whole amount of the capital fixed by the articles of association was not subscribed. This case not only draws the true distinction between cases where the subscription of a certain amount of stock is made by the terms of the act of incorporation, or the general law, a condition precedent to the existence of valid stock, and where it is not, but holds as was held in Nutter *v.* Lexington Railroad Co., 6 Gray ,85, that *unless* the law requires the stock of the corporation to be all subscribed for before it is created, there is no implied condition that all the stock created shall be subscribed for or issued. The case cites and confirms the doctrine of Salem Milldam Corporation *v.* Ropes, 6 Pick. 23, 9 Pick. 187, and Central Turnpike *v.* Valentine, 10 Pick. 142, which are cited and followed in the decision of Eaton *v.* Pacific National Bank. When therefore the dictum in Chubb *v.* Upton is followed to the original authorities upon which it is based, it is found to apply only to cases where the subscription or payment of the whole amount of the capital is not made a condition by the law organizing the corporation or permitting an increase.

In the case of the increase of the capital stock of a national bank the statute is explicit, and the rule laid down in the decision of Eaton v. Pacific National Bank is the only rule properly applicable to such an increase.

Effect of Payment of Subscription.

The payment of his subscription by plaintiff in error cannot possibly constitute any element of waiver of his right to insist that the whole amount of the proposed increase should be subscribed for and paid before he should be bound by his subscription.

It is true that there is a passing suggestion in the case of Delano *v.* Butler, 118 U. S. 634, that the payment by the subscriber for his shares might be considered as an element in such waiver. We must here urge that there can be no legal force in this suggestion.

The only power of the Pacific National Bank to increase its capital was derived from the provisions of Sect. 5142 of the Revised Statutes. Under the articles of association of the bank, it could increase its capital only "according to the provisions of" this section. This section provides that "no increase of capital shall be valid until the whole amount of such increase is paid in and notice thereof has been transmitted to the comptroller of the currency and his certificate obtained, specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as part of the capital of such association."

In the language of the court in the case of Eaton *v.* Pacific National Bank, "To make the increase of the capital stock valid it must be authorized in accordance with the articles of association; the whole amount of it must be paid in; notice thereof must be transmitted to the comptroller, and he must certify 'that it has been duly paid in as part of the capital of such association' and must approve of it. (U. S. Rev. Stats., Sect. 5142.) The plaintiff therefore was compelled to pay in her money before the final action of the comptroller in order to become entitled to any part of the new stock."

It must be perfectly clear, upon consideration, that payment for shares in a proposed increase of stock in a national bank cannot form the slightest element of a waiver on the part of the subscriber of his right to insist that the increase shall be made as proposed.

Sect. 5142 of the Rev. Stats. makes it absolutely necessary that all subscriptions to a proposed increase of stock should be fully paid before other *equally essential* steps toward perfecting the increase can be taken. Payment must precede notice to the comptroller, and must precede action by the comptroller. Payment is a condition precedent to being entitled to any part of the proposed new stock. Whatever increase of stock is made, that increase must follow payment by the subscribers, and cannot, under any circumstances, precede it. It cannot even be simultaneous with it. As an element of waiver, therefore, the effect of payment must be zero.

Certificate of Comptroller.

If it be urged in behalf of the receiver that the certificate of the comptroller, dated Dec. 16, 1881, approving the increase of $461,300, is conclusive upon the plaintiff in error, we cannot make better answer than to quote from the opinion of the court in the case of Eaton *v.* Pacific National Bank: "It is argued that the certificate of the comptroller is conclusive on the plaintiff that the sum of $461,300 was actually paid in as an increase of capital stock, and that this includes the amount which she paid. Undoubtedly the public, in dealing with a bank, do rely to some extent upon the certificate by the comptroller of the amount of the increase in the capital stock of the bank, and that this amount has been actually paid in; and so long as the certificate remains unrevoked, it may be taken to establish the amount of the capital stock of the bank. If the certificate happens for any reason to be false, it is probable that an assessment may be laid upon the shareholders to make up the deficiency in

the capital stock. But that the certificate of the comptroller makes any one a shareholder who is not one, or enables a bank to appropriate a debt it owes to a payment for stock, or to treat one of its creditors as a shareholder, is a proposition to which we cannot assent. The obligation of the plaintiff to take the new shares depends upon her contract with the bank. If we assume that immediately after the vote of Dec. 13, 1881, the plaintiff could have treated the original vote as abandoned, and could have demanded her money and brought and maintained an action to recover it, the action of the directors and of the comptroller in erroneously including the amount she had paid, in the amount which had been paid in to increase the capital stock by $461,300, cannot affect her legal relations with the bank, unless she has assented to or ratified that action, or is estopped by her conduct, or has been guilty of laches."

If it appears, as in the case at bar, that no part of the $461,300 was paid in on account of the increase as finally certified by the comptroller, certainly the certificate of the comptroller cannot be conclusive evidence that the contrary is true. The comptroller's certificate shown by the facts to be false cannot bind the subscriber to the proposed new stock. If that were so, it would be a fraud upon him.

The statute makes the comptroller the judge of the evidence showing due organization of a bank, and authorizes him to decide when the bank shall commence business; and his certificate in that respect, therefore, is conclusive. (Rev. Stats. Sects. 5168, 5169, 5170.) But as to the increase of the stock, certain facts must be made affirmatively to appear, and must actually exist, — the certificate of the comptroller being only one of those facts.

It is true that some adjudications and certificates made by the comptroller with reference to liquidation and proceedings in case of insolvency of national banks have been held to be conclusive, but the comptroller's certificate that the stock of a bank had been duly increased or that a particular person was a shareholder therein has never been adjudged conclusive. Such a position would leave interested parties without any opportunity to contest the fact before the comptroller or in any court where the personal liability of a stockholder is in question.

Entries on Stock Ledger.

The receiver relies somewhat upon the fact that the officers of the bank entered the name of the plaintiff in error at the head of a debit and credit account in its stock ledger. Upon the facts found in the case there is nothing to show when such entries were made, and there is no finding that such stock ledger was ever exhibited to or seen by a single creditor of the bank. To argue upon such a state of facts that the entry of this account in the stock ledger of the bank made the plaintiff in error a shareholder therein is neither more nor less than to claim that the officers of the bank by making unauthorized and illegal entries upon its books could by the mere force of such entries make the plaintiff in error a shareholder against his will.

No such register or list of shareholders as is required by Rev. Stats., Sect. 5210, was ever kept by the Pacific National Bank. It is only such a list as is provided for in that section that is "subject to the inspection of creditors." No record of stockholders in this bank, which creditors were

entitled to see, contained the name of the plaintiff in error as a stockholder.

The stock ledger is not such a list as creditors are entitled to see under Sect. 5210, but is simply a private book of accounts between the bank and its stockholders, who alone are entitled to see it. The president and cashier had no authority, either express or implied, to enter the name of any subscriber to the proposed new stock upon a list kept for the benefit of creditors, before the proceedings to perfect that increase had been completed. Actual knowledge that a shareholder's name was upon such a list is required by Sect. 5210, before he could be charged as a contributor towards the debts of the bank on account of such entry. No estoppel (which rests in fraud or negligence) could arise without such actual knowledge. But in the case at bar there was no such list, and no authority to make one with the name of the plaintiff in error upon it, as the $500,000 increase was never perfected.

II.

By the receipt of the certificate, Nov. 5, 1881, the plaintiff in error did not intend to, and did not, waive his right to insist that the whole $500,000 of new stock should be taken before he should be bound by his subscription.

No one can be held to have waived a legal right unless in his conduct claimed to constitute such waiver he proceeded upon a knowledge of the material facts.

In this case the plaintiff in error received the certificate one month and five days after the date upon which all subscriptions to the increase of five hundred thousand dollars were

payable. He received it one month and five days after the president of the bank had informed him that the whole $500,000 had been taken.

This statement by the president of the bank, believed by the plaintiff in error to be true, the giving of a receipt merely at that time, and the subsequent lapse of time before the certificate was delivered, gave the plaintiff in error a right to believe when he took the certificate that the entire $500,000 of new stock had not only been taken but had been paid in, and the issue approved by the comptroller. The plaintiff in error had a right to assume that the bank was acting legally, and the statement by the president of the bank, Oct. 1, made it strongly probable that by Nov. 5 everything had been done necessary to complete the $500,000 increase to its full amount.

The burden is upon the receiver to show a waiver on the part of the plaintiff in error. All the facts negative any intent to waive, and there is no finding of any waiver. The facts as found specially by the Circuit Court are the ultimate facts, or propositions of fact, upon which judgment is to be entered in this case. The Circuit Court has found that on Oct. 1 the plaintiff in error believed the statement of the president of the bank then made, that the new stock had all been taken; that the president of the bank also stated at the same time that the bank was not then in a position to issue certificates; and that on Nov. 5 the plaintiff in error received the certificate. No inference of waiver in fact can be drawn from these propositions of fact; and certainly the mere receipt of a certificate under such circumstances, with no intent to waive, cannot amount to a waiver in law.

III.

The whole conduct of the plaintiff in error after he was informed of the fact that the proposed increase of $500,000 to which he subscribed had not been perfected, was inconsistent with any other position on his part than that of a refusal to assent to the new increase which the directors and the comptroller had attempted. What the plaintiff in error did is expressly found by the court. Upon these findings it cannot be said, as a matter of law, that he in any way assented to the $461,300 increase.

It was at the annual meeting held Jan. 10, 1882, that the plaintiff in error first learned that the condition of his subscription had not been complied with. He thereupon notified the bank through its attorney and directors that he did not propose to be considered as a holder of any of the new stock. He intentionally refrained from voting on any new stock, expressly so stating on the ballot which he cast as guardian and trustee. This ballot was taken by the bank, and was of itself additional notice to the bank of the position of the plaintiff in error. At this annual meeting the plaintiff in error was notified that the only condition upon which he could continue to hold the fifty shares of new stock alleged by the bank to be his, was by paying an assessment of $5,000 thereon. This he plainly determined never to do. He knew that if he did not pay that assessment either a receiver would be appointed or the new stock claimed to be his would be advertised and sold at public auction to pay the assessment. In either event he would be forever deprived of any possible benefit to be derived from said stock. Knowing all these facts, he nevertheless

paid $5,000 as an assessment on the old stock held by him as guardian and trustee for his son, *using his own personal funds for that purpose*, but at the same time adhered to his position as to the alleged new stock, refusing to pay any assessment thereon and allowing the same to be publicly advertised for sale. How can it be held with all these facts in view that Mr. Aspinwall ever assented to or ratified the change in the proposed increase of stock?

Perfectly able to pay the assessment on the alleged new stock, and having faith enough in the bank to pay $5,000 assessment on the old stock for the benefit of his son, he allowed the new stock which was claimed to be his by the bank to be publicly advertised for sale and to remain so advertised nearly a month, until the actual sale thereof was prevented by the appointment of a receiver.

Of what significance was the mere retention of the certificate by the plaintiff in error when taken in connection with his other conduct in this whole matter?

His notice to the bank on the very day of the annual meeting Jan. 10, 1882, when he first learned that the proposed increase to which he had subscribed had not been perfected; his refusal to vote on the alleged new stock, expressly so stating upon his ballot; his refusal to pay any assessment on such alleged new stock; his allowing the same to be publicly advertised for sale by auction May 31, 1882, so that the public as well as the bank knew that he refused to recognize it as his stock; his consultation with counsel and the determination of a form for a demand upon the bank for the $5,000 he had paid, — all these were acts consistent only with dissent and repudiation.

From Jan. 10, when the defendant first learned the facts,

to March 18, over two months, the bank remained in the exclusive charge of the bank examiner, contracting no debts and doing no business, and likely any time to go into the hands of a receiver. Certainly during this time it would have been wholly idle to make a return of the certificate.

From March 18, when the bank reopened to business without any vote of stockholders, down to the appointment of the receiver, the public had full and ample notice of Mr. Aspinwall's position as to the new stock from the very fact of his having refused to pay the assessment.

The Circuit Court has found as facts that the plaintiff in error knew on and after April 28, 1882, that the new stock alleged to be his was advertised to be sold May 31, 1882, and that "he took and intended to take no action to prevent such sale." (Findings of Facts, Record, page 19.)

This action and intention on his part were inconsistent with any other position than that first announced by him, Jan. 10, at the annual meeting of the stockholders.

The Circuit Court has thus found many acts and intentions on the part of the plaintiff in error, which amount to a refusal on his part to assent to the newly attempted increase. No assent is found; no waiver; no ratification. It appears, however, as one of the facts of the case, that the plaintiff in error retained the certificate which he received Nov. 5, 1881, until May 22, 1882. The receipt and retention of that certificate, notwithstanding his actions and intentions to the contrary, the Circuit Court has held to be conclusive upon the plaintiff in error. There being no finding of any assent, waiver or ratification in fact, the receiver can prevail only upon some fact which as a matter of law is conclusive in his favor. The Circuit Court has held the receipt and retention

of the certificate to be so conclusive. The receipt of the certificate we have already discussed. Let us inquire what significance should attach to its retention. It is our claim that the plaintiff in error was under no obligation to surrender or return this certificate as a part of his refusal to share in the new increase. What was this certificate? It did not and could not represent shares in any definite increase. When it was prepared and issued, no increase had been made. It was void from the beginning. It appears to have been prepared and dated Oct. 1, 1881, the day the plaintiff in error paid his subscription. (Findings of Facts, Record, page 11.)

This was over two months before the vote of the directors first proposing an increase of $461,300. No one pretends that at the time the certificate was made there was any new stock whatever. It cannot be claimed that when the certificate was delivered to the plaintiff in error, Nov. 5, 1881, there was any new stock, or that the certificate was a valid certificate representing shares in any increase. Upon the strongest claim of the receiver, the new stock was not created until Dec. 16, 1881, the date of the comptroller's certificate. It was not proposed by the directors until Dec. 13, 1881. The certificate was received by the plaintiff in error Nov. 5, 1881. It was therefore in his hands one month and eight days before the increase of $461,300 was even thought of. The plaintiff in error was then holding it and continued until Jan. 10, 1882, to hold it, in the rightful belief that it represented fifty shares in an increase of five thousand shares. When he first learned, at the annual meeting, Jan. 10, 1882, that that increase had not been made, he thereby also learned that the certificate he had received represented nothing but

an abandoned scheme of increase; that the bank had issued it illegally, when it had no power in law to issue it; and that it was therefore of no validity and of no value. Upon the new state of facts disclosed to the plaintiff in error at the annual meeting, the certificate he had received had no connection with the increase of stock on which it is now sought to hold him. We submit that if, on Jan. 10, 1882, and thereafter, he made his position in the matter sufficiently plain to the bank and to the public by his other acts, and he certainly did, he was not bound to return this certificate. He had a right to regard it and treat it as wholly void. He had surrendered the receipt for the $5,000 paid by him, and the certificate was therefore the only evidence he had of the transaction between him and the bank. It being void as a certificate, he had a right to retain and use it as evidence of his payment.

But whether this view is adopted or not, the failure on the part of the plaintiff in error earlier to return the certificate is only one item in his conduct after Jan. 10, 1882, which is to be weighed in connection with, and affected by, all his other acts and refusals on and after that date.

There was no time from Jan. 10 down to the appointment of the receiver when the certificate in possession of the plaintiff in error, taken in connection with his conduct, stood for any value or had any significance whatever. From Jan. 10 to March 18 the bank was notoriously a closed and failed bank. From March 18 down to the appointment of the receiver it must have been perfectly understood by the bank and by the public that Mr. Aspinwall had refused to recognize the fifty shares which the bank had attempted to foist upon him.

We have been able to find no case which supports the ruling of the Circuit Court that there is a legal conclusiveness attaching to the very act of retaining the certificate which cannot be overborne by other conduct showing a contrary purpose. It is true that a number of cases are cited in some prominent text-books as supporting that proposition, but in every one of these cases all the other acts of the alleged stockholder were consistent with, and went to support, the conclusion that up to the time of the final disaster of the corporation, he was ready to take advantage of any benefit which might accrue to the alleged stock. We have found no case like the one at bar in which there are the elements of a void certificate illegally issued against the strict provisions of the statute, and a series of prompt and unmistakable acts of dissent and repudiation on the part of the alleged shareholder. Either one of these elements takes the case wholly out of the rule stated in the text-books, but unsupported, as we claim, by authority. Taking both elements together, the ruling that the retention of the certificate is legally conclusive seems to be wholly without reason.

In the case at bar the plaintiff in error did in fact return the certificate to the bank before the appointment of the receiver. The facts found by the Circuit Court conclusively show that the demand for his money made by the plaintiff in error May 22, 1882, was in pursuance of a definite purpose formed Jan. 10, 1882, the day of the annual meeting, or immediately afterwards. It is expressly found that the form of this demand was determined upon by the plaintiff in error and his counsel, May 16, 1882. (Findings of Facts, Record, page 18.)

There is nothing to show that at the time the plaintiff in

error made this demand and surrendered the certificate he had any knowledge or notice that the bank was closed or was about to pass into the hands of a receiver. The return of the certificate by the plaintiff in error at that time was a mere preliminary to his suit brought May 30, 1882, and was not in any way a necessary part of his refusal to assent to the increase of $461,300. This refusal he had announced as early as Jan. 10, 1882, and had ever since acted consistently therewith.

BENJAMIN N. JOHNSON.

Supreme Court of the United States.

No. 957.

WILLIAM ASPINWALL, *Plaintiff in Error*,

v.

PETER BUTLER, *Receiver*.

REPLY TO ARGUMENT OF DEFENDANT IN ERROR.

In view of the closing remark in the argument of the receiver, "We see no escape from the position that the court must find this stock to be valid or invalid, and rest the conclusion on that issue," and in view of the earnest plea by the receiver that the case be decided upon that single point, we desire to add a few suggestions on the question of the validity of the increase of stock. The receiver appears to ignore the underlying principles upon which a corporation derives and maintains its existence. He wholly fails to recognize the contractual relations which must always exist between the corporation and the government on the one side and among the individual members of the corporation on the other side. This contractual relationship is structural and fundamental. An increase of the capital stock of an existing corporation is a modification of the contract between the corporation and the government. There are, therefore, two well-established propositions of law in regard to such an alteration of the charter.

First. That the charter of a corporation is a contract between the corporation and the government within the meaning of the constitutional prohibition that the government cannot impair the obligation of a contract, and any attempt (on its part) without the consent of a corporation to make any alteration in its charter is therefore unconstitutional and void.

Wilmington Railway Company *v.* Reid, 13 Wall. 266.
Dartmouth College *v.* Woodward, 4 Wheat. 642.

Second. Any attempt on the part of a corporation itself to increase its capital stock without the consent of the government is *ultra vires* and void.

Scovill *v.* Thayer, 105 U. S. 143.

In accordance with these two fundamental and unquestionable propositions of law, we deny the power of the comptroller to increase the capital stock of the Pacific National Bank, as claimed by the receiver on page 11 of his argument. We concede that the government, acting through the comptroller, has done all that was necessary on its part to make the increase of $461,300 valid. The difficulty is that the association itself on its part has never authorized or ratified such an increase. The association could authorize or ratify an increase of its stock only in one of two ways: by a delegation to its directors of the powers to increase the stock; by direct action through its stockholders at a corporate meeting qualified to vote on such an increase.

We submit that in neither way did the Pacific National Bank ever authorize or ratify the increase of stock claimed by the receiver.

Power of Directors.

The increase of the capital stock of this bank must have been made if at all under the authority of Sect. 5142 of the Rev. Stats., and Articles 5 and 6 of the Articles of Association of the bank.

The effect of Art. 5 of the Articles of Association in connection with Sect. 5142 is merely to give the corporation authority on proper proceedings to increase the capital stock and to fix the limits to such increase. Without such express authority the capital could not be increased even by the unanimous consent of all the stockholders.

Cook on Stockholders, 2d Ed., Sect. 281, and cases cited.

The provisions in Sect. 5142 as to certain cond itions precedent to a valid increase are additional safeguards for the protection of creditors and the comptroller, and do not cover the steps to be taken by the association itself.

"An increase or reduction of the capital stock of the corporation is such a fundamental change in its affairs tha

although it has been duly authorized by Act of Congress or by the charter of the corporation it cannot lawfully be effected merely by the act or assent of the Board of Directors, but must be authorized by the shareholders at a corporate meeting."

Cook on Stockholders, Sect. 285, and cases cited.

The directors of a corporation have no lawful authority to increase the capital stock, though the charter expressly authorizes the increase. They can merely superintend and manage the ordinary and regular business of the association. Any alteration in the constitution or in the amount of stock must be made by the shareholders in general meeting.

Morawetz on Corporations, 2 Ed., Sect. 512.

But the power to increase the capital stock may be vested in the directors.

Cook on Stockholders, Sect. 285.
Sutherland *v.* Alcott, 95 N. Y. 93.

This authority, however, must be *expressly* given. There is no such express authority in the Rev. Stats., or in the Articles of Association of this bank. Rev. Stats., Sect. 5142, simply authorizes the association to "provide for an increase." This section clearly does not designate whether the increase shall be effected by the stockholders or by the directors. Sect. 5145 provides that the affairs of the association shall be managed by not less than five directors. This refers to the ordinary business transactions of the company, and not to any novation of the contract of association.

See Railway Company *v.* Allerton, 18 Wall. 233.

In that case the charter of the company provided that the "capital stock of the corporation shall be $100,000, and may be increased from time to time at the pleasure of said corporation," and also that "all the corporate powers of said corporation shall be vested in and exercised by a board of directors." It was held nevertheless that the directors could not increase the capital stock. Mr. Justice Bradley, in delivering the opinion of the court, said: "We are satisfied that the decree must be affirmed on the broad ground that a change so organic and fundamental as that of increas-

ing the capital stock of a corporation beyond the limit fixed by the charter cannot be made by the directors alone unless expressly authorized thereto. The general power to perform all corporate acts does not extend to the reconstruction of the body itself or to an enlargement of its capital stock." "If the charter provides that the capital stock may be increased, or that a new business may be adopted by the corporation, this is undoubtedly an authority for the corporation (that is, the stockholders) to make such a change by a stockholders' vote, in the regular way."

See also

Morawetz, Sect. 512 and cases cited.

The receiver virtually claims that Article 6 of the Articles of Association, and Sect. 11 of the By-Laws of the Pacific National Bank, amounted on the part of the association to a complete delegation of its corporate powers relating to an increase of stock to the board of directors. He even goes so far as to urge that this article and by-law were "designed to commit the individual will of each stockholder into the keeping of the directors, and to make their will and determination in the premises as his own."

We doubt if so much meaning was ever before extracted from so little and so general language. Such a construction of the article and by-law in question is not only to be looked upon with great disfavor by the law, but even without such disfavor is in itself absolutely impossible.

The only thing in this article in any way relating to an increase of the stock is as follows: —

"They shall have the power to provide for an increase of the capital of the association, and to regulate the manner in which such increase shall be made, and generally to do and perform all acts that may be legal for the board of directors to do under the Revised Statutes aforesaid." It is plain that the purpose of this section is merely to confirm the powers given by the Revised Statutes, and also to delegate to the directors the duties of planning the details of any increase of stock, in case such increase should be decided upon. At most, it confers on the directors the authority to provide the method by which an increase may be effected, and in the absence of any specific method designated by them, the increase would have to be effected as provided by the general law.

Section 11 of the By-Laws appears to embody the only action which the directors ever took under their power "to provide for an increase of the capital of the association."

The general law, therefore, must control an increase of stock in the case of this bank, except so far as the same is modified or effected by this Section 11. The scope and effect of Section 11 we will discuss hereafter. We are now concerned with that part of the argument of the receiver in which he lays so great stress upon that portion of Article 6 of the Articles of Association, which gives to the directors the power "to regulate the manner in which such increase shall be made."

The position of the receiver is that this language amounted to a complete surrender on the part of the association of its corporate powers relating to the increase of stock, and that it gave to the directors that corporate power and authorized them as directors to make an increase themselves.

Let us see to what length this argument will carry the receiver. An examination of Article 6 will show that this very language to which, in the clause relating to an increase of stock, he gives such potent meaning is again used in the same article in another clause relating to the election of directors. The directors in this same article are expressly given the power "to regulate the manner in which the election of directors shall be made"

According to the argument of the receiver, this provision Article 6 amounted to a surrender on the part of the stockholders of their right to elect directors, and authorized the directors to elect themselves *in perpetuam*. This conclusion cannot be escaped from except by arbitrarily making the same language mean different things in clauses of the same article.

The logical result of the receiver's position ,therefore, is that the directors of the Pacific National Bank had the power to alter the charter of the corporation at their own will, and also the authority to reserve to themselves forever all the powers to be exercised under that charter. This contention results in an absurdity which effectually refutes the receiver's argument.

There is nothing in Sect. 11 of the By-Laws which gave the directors of the bank the power claimed for them by the receiver. The whole force of this by-law is restricted by its opening clause, "Wherever an increase of stock shall be

determined upon." The question is, Mho is to determine upon such an increase? The association, through its stockholders, plainly, and not the directors, for they have nowhere been given that power. Waiving this point, however, it must be plain that the scope of this by-law is only an arrangement of details, and the reserving to the shareholders of the bank a pre-emptive right in any increase which they should determine upon. The by-law does not confer the power on the directors to increase the stock, but merely designates the method of effecting the increase when properly determined upon. But the receiver attaches great weight to the closing sentence of this by-law: "If any stockholder should fail to subscribe for the amount of stock to which he may be entitled within a reasonable time, which shall be stated in the notice, the directors may determine what disposition shall be made of the privilege of subscribing for the new stock."

From this provision the receiver argues that the directors derive the power to abandon any part of the increase not subscribed for by the stockholders. He goes so far as to claim that such an abandonment or destruction of any portion of the proposed increase could be carried out by the directors without the consent of the subscribers. The answer is apparent. This by-law does not contemplate a cancellation or destruction of the privilege of the stockholders to subscribe for the proposed new stock, but intends only a disposition of it to some one who will exercise the privilege. It authorizes the directors to *dispose* of the privilege, not to *destroy* it. Its purpose is plainly to cause all the shares in the proposed increase to be subscribed for and taken, if not by the stockholders who are entitled to them, then by some one else. It is designed to accomplish the increase voted, not to change that increase to a different one.

Action by the Association.

If as we contend an increase of the capital stock of the Pacific National Bank must be authorized, or by the ratified direct action of the association, when was such action ever taken?

The facts found by the court show that the only meeting held by the stockholders of the bank subsequent to the vote of the directors on Sept. 13, 1881, was the annual meeting

of Jan. 10, 1882. Section 1 of the By-Laws of the bank expressly provides that the notices of meetings shall state the time and "object of the meeting." The call and notice of the annual meeting of Jan. 10, 1882, stated no object except a "choice of directors, and for any other business that may legally come before them." That the words "to transact such other business as may legally come before the meeting," when inserted in a call, does not give the meeting the power to pass upon any special or extraordinary matter, has been repeatedly decided.

Gray *v.* Christian Society, 137 Mass. 329.
People's Insurance Company *v.* Westcott, 14 Gray, 440.

If unusual business is to be transacted at a meeting which is a customary one, the call must specify particularly such unusual business.

Cook on Stockholders, Sect. 595 and cases cited.
Zabriskie *v.* Cleveland Railway Company, 23 Howard, 381.
Atlantic DeLaine Company *v.* Mason, 5 R. I. 463.

This last case held that an assessment could not be levied at a meeting of the stockholders where no specific notice of such matter had been inserted in the call.

See

Morawetz, 482, and cases cited.

Upon the general principles of law and Section 1 of the By-Laws of this bank, it is perfectly clear that the annual meeting of the stockholders held Jan. 10, 1882, had no power to take corporate action effecting any increase of stock. No notice of any such matter or of any proposed assessment of stock was given to the stockholders. We have, therefore, this state of facts: The directors voted an increase of $500,000, Sept. 13, 1881; they invited the shareholders to subscribe to such increase. Nov. 18, 1881, the bank failed and closed its doors to business; Dec. 13, 1881, the directors voted to change the increase to one of $461,300. During all this time the stockholders were not consulted and held no meeting.

On Jan. 10, 1882, was held an annual meeting of the stockholders, which had no power under the notice to transact any business except the usual and regular business of an annual meeting. This was the last meeting ever held by the stockholders of the bank. A mere statement of these facts make it conclusive that the Pacific National Bank never took any direct corporate action authorizing or ratifying the alleged increase of stock.

It is true that in the case of Delano *v.* Butler, 118 U. S. 634, Mr. Justice Matthews, in stating the opinion of the court, used these words: "In the present case the association did, in fact, finally assent to an increase of the capital stock limited to $461,300." In the Delano case the point which we now present was not argued. It was not called to the attention of the court that the annual meeting of Jan. 10, 1882, had no power to take corporate action affecting so unusual a matter as an increase of stock. In the same opinion Mr. Justice Matthews laid down as one of the three things which must concur to constitute a valid increase of the capital stock of a national banking association: "*First.* That the association, in the mode pointed out in its articles, and not in excess of the maximum provided for by them, shall assent to the proposed increase."

We submit that on the facts found in this case the Pacific National Bank never assented to the increase alleged by the receiver. The directors had no power to authorize or ratify the increase in behalf of the association, and the association itself never recognized the increase by any vote of the stockholders at a meeting qualified to act in such a matter.

In the case of Delano *v.* Butler, it was not necessary for the court to pass upon the validity of the new stock as a distinct question. The conclusion of the court was reached independently of that point. The scope of the decision in that case was as follows: That Delano having by so solemn an act as the payment of the assessment recognized the new stock at a time when the officers of the bank were preparing to reopen it for business, and when they were treating and representing the capital to the public as $961,300, could not afterwards be heard by the court to question the validity of the increase.

BENJAMIN N. JOHNSON.

Office Supreme Court U. S.
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CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 957.

WILLIAM ASPINWALL, PLAINTIFF IN ERROR,

v.

PETER BUTLER, RECEIVER OF THE PACIFIC NATIONAL BANK, OF BOSTON.

SUBMITTED UNDER RULE 20.

Brief for the Plaintiff in Error.

In this case the plaintiff is seeking to enforce a liability against the defendant created by provisions of the Statutes of the United States. It is true that the defendant is bound by the conditions of these statute provisions. But he is bound no farther. He is bound to fulfil those conditions and no others. And the plaintiff is likewise bound to the same conditions and to the same extent. Only as the plaintiff on his part has performed them, can he exact performance of them from the defendant.

The liability here asserted against the defendant is the personal liability of a stockholder for the debts of the corporation of which he is a member.

"It is very clear that no such liability to an action exists at common law." "To create any individual liability of members for the debt of a corporation, a body politic, created by law, and regarded as a legal being, distinct from that of all the members composing it, and capable of contracting and being contracted with as a person, is a wide departure from established rules of law, founded in considerations of public policy, and depending solely upon provisions of positive law. It is, therefore, to be

construed strictly, and not extended beyond the limits to which it is plainly carried by such provisions of statute." Gray *v.* Coffin, 9 Cush. 192 (199).

With this stated as the rule that underlies this whole case, this brief passes to the particulars of this defence.

PART FIRST.

The defendant never entered into the contract which the plaintiff is seeking to enforce against him. He never agreed to take shares (fifty or any other number) of capital in the Pacific National Bank, in an increase of capital of $461,300; that is, 4,613 shares.

I. The only contract, which the defendant in the matter in controversy entered into, was in writing. It consisted of the following proposition made to the defendant by the Directors of the Pacific National Bank, and the following acceptance of the proposition made by him.

"A. I. BENYON, *President.* J. M. PETTENGILL, *Cashier.*

PACIFIC NATIONAL BANK,

105 DEVONSHIRE STREET,

BOSTON, September 13, 1881.

At a meeting of the Directors of this Bank, held this day, it was

"Voted, That the capital of this bank be increased to one million dollars, and that the stockholders of this date have the right to take the new stock at par in equal amounts to that now held by them.

"Subscription to the new stock payable October 1st. Parties desiring to anticipate payment will be allowed interest to that date at four per cent. per annum.

J. M. PETTENGILL, *Cashier.*"

"I will take the fifty new shares to which I am entitled and will pay for them as above.

WILLIAM ASPINWALL."

II. Here the Directors propose an increase of the capital of the bank in the sum of $500,000, that is, by 5,000 shares. And they offer to this defendant the privilege of taking stock to the amount of $5,000 of that whole proposed increase of $500,000.

They invite him to subscribe for 50 of those 5,000 shares. And he accepts the invitation as it is given. He agrees to take what is offered him, $5,000 of the new capital of $500,000, — one one-hundredth part, one per cent., of the whole proposed increase, — 50 shares if 5,000 are to be created. He will take 50 if the rest are taken, not otherwise, He agrees to be bound by his subscription, when the whole proposed increase is subscribed for, not otherwise. He will be bound when 5,000 shares are bound, not before. This is the written contract as its terms show. This is what appears on its face.

III. But there is light to be thrown upon this contract from beyond its own terms. It was a contract authorized and regulated by law; and it is useful to learn what conditions of contract the law authorized in this case. This contract was entered into under the following provisions of Acts of Congress. It is to be governed by these provisions to be found in the statutes relating to national banks, as follows: —

IV. (1) "Any association formed under this title may, by its articles of association, provide for an increase of its capital from time to time, as may be deemed expedient, subject to the limitations of this title." (R. S. § 5142.)

Thus the articles of association, of any such association, are made a part of the laws of the United States.

V. The articles of this association conferred upon the Board of Directors certain executive powers. They also, with certain other specified legislative authority, conferred upon that Board the general legislative authority "to make all by-laws that it may be proper and convenient for them to make under" the Revised Statutes of the United States. And also the specific legislative authority "to provide for an increase of the capital of the association, and to regulate the manner in which such increase shall be made." This, along with a precisely similar authority, "to regulate the manner in which elections of Directors shall be held." (Art. Sixth.)

VI. The legislative authority in this matter of the capital stock had already been restricted by the preceding article (Art. Fifth). That had fixed the original capital at $250,000, to be divided into shares of $100 each. It had then (1) limited any increase to $1,000,000.

And (2) it had provided that, "in the case of the increase of

capital of the association, each stockholder shall have the privilege of subscribing for such number of shares of the proposed increase of the capital stock as he may be entitled to, according to the number of shares owned by him before the stock is increased."

Whatever further legislation upon this subject the Directors might make, they could not legislate away from the individual shareholders — "each stockholder" — the privilege provided for them by this Fifth Article. Nor could they exempt themselves from the duty which the same article imposed upon their Board.

VII. The legislative authority thus conferred upon the Board of Directors and thus restricted, that Board had proceeded to exercise, precisely where it should be exercised, that is, in the drafting and adopting of a Code of By-laws. The matter of an "Increase of Stock" was there treated in Section 11. See agreed statement of facts.

VIII. This section provided that (1) "whenever an increase of stock shall be determined upon, it shall be the duty of the Board to notify all the stockholders of the same."

That is, it was for the Board of Directors first to determine upon an increase, fixing, of course, its amount; and then to make known that determination in full, including the amount, to "all the stockholders." To the stockholders as individuals, and not to the corporation of which they were corporators.

This is what is deemed a proposal of increase; and the amount of increase, thus determined by the Directors and made known to all the stockholders as individuals, is what the Supreme Court, in the case of Delano *v.* Butler (118 U. S. 649), designates as "the proposed increase."

IX. The counsel for the plaintiff, in his oral argument before the Court below, urged with emphasis and reiteration that the association, the corporate body, had conferred all the power, which it might otherwise have had over this subject, upon the Board of Directors. This assertion is accepted by the defence; and thus in this case it becomes an admitted position that the association, as an association, had no authority in that matter: a position soon to be made stronger by argument.

X. This Section 11 went on further and provided (2) as follows: "And each stockholder shall have the privilege of subscribing for such number of shares of new stock as he may be entitled to subscribe for in proportion to his existing stock in the Bank."

This was the privilege already secured to the stockholders by the Articles of Association. It is only needful to notice that it could not be exercised unless each stockholder was informed of the amount of increase, and with it, of course, of the number of proposed new shares.

XI. This assenting action of the individual stockholders is all that is required in order to the affirmance of the proposal of the Directors for an increase of capital stock. Thus it is seen that the assent of the corporation to such an increase is wholly an immaterial fact — a condition unknown to the law. The statute implies no reference to such assent; that is, beyond the action of the corporation to be taken through its Directors, in the first step, the initial proceeding: the proposal of an increase to a fixed amount. Beyond this the assent of the association is unknown. The proposition is not to be submitted to the corporation in any stage.

XII. This point is vital to a correct understanding of this case. The Court is most respectfully asked carefully to consider it.

It is not the association, it is not the corporation at all, which is to be notified of the increase of stock determined upon by the Board of Directors. All the power which the association ever had in this matter has been expressly transferred to, and vested in, the Board of Directors. And the whole of that power is the power to propose an increase to a definite, specific, named amount. Propose it to whom? To the corporation? To the association? Not at all. The Directors are nowhere required to submit their proposition for such increase to the corporation; and there is no provision for action of that corporation upon that proposition.

The Directors are, however, required to submit such proposition somewhere. They must submit it to the individual stockholders, as individual stockholders. Their duty was to "notify all the stockholders of the same."

XIII. Thus there is an assent which is known to the law. It is the assent of those to whom the proposed increase is to be submitted: the individual stockholders. Their assent must be obtained. As to any one of them there can be no increase of capital stock whatever, except by his assent and positive action. An increase of capital stock in the ownership of any stockholder

is just as much dependent upon the assent of his individual will as is a substantial change of the corporate purpose or certainly as is an extension of the corporate period; nay, more, as much as his originally becoming a stockholder.

Any analysis of this operation of increasing the capital stock of a national bank, which leaves out this element of the individual election and action of the individual stockholders, is essentially defective. And any judgment resting upon such defective analysis is very liable to be erroneous. It does not cure the error to substitute the action of the association for the action of the individual shareholders. The latter in this matter the law knows; the former it does not.

XIV. (3) The remaining provision of this section was as follows: "If any stockholder should fail to subscribe for the amount of stock to which he may be entitled, within a reasonable time, which shall be stated in the notice, the Directors may determine what disposition shall be made of the privilege of subscribing for the new stock."

It is urged by the counsel for the plaintiff that the authority here given to dispose "of the privilege for new stock" includes the authority to cancel that privilege.

In answer it is enough to say that cancelling the privilege to subscribe so far as the same has not been exercised, does not cancel the fact that a certain sum of increase has been proposed to the stockholders, and does not cancel any obligation which the statute may have based on that proposed sum. The directors cannot represent the stockholders where they are not authorized to act for them; nor in any action contrary to the statutes of the United States. If by such cancellation a new sum of increase has been reached, that is an increase which has never been proposed to the stockholders.

XV. Thus, as affecting this case, the Articles of Association had provided, and the Board of Directors had also provided for, and regulated, the manner in which an increase of the capital stock of the Association should be made. No further legislation on their part is shown.

XVI. For further legislation upon this subject we must return to the laws of the United States. The section of the Revised Statutes already cited (5142) has further provisions. It now takes up the subject where the Articles of Association (directly and

indirectly) leave it. These Articles (including the By-laws) have provided for (1) A proposal from the Board of Directors to all the individual stockholders of a certain increase to be made to the capital of the bank. (2) The privilege which thereupon shall be open to such stockholders, each of them.

XVII. And, now the statute resumes the subject. It goes on to prescribe what action on the part of individual stockholders is necessary to push forward one step further this undertaking to increase the capital of the bank. Its next words are, "and no increase of capital shall be valid until the whole amount of such increase is paid in." This action is required not from the association, the corporate body; but at the hands of individual stockholders, as such. The corporate body is not to pay; only the individual corporators.

What "the whole amount" here designates cannot be doubtful. Its call cannot be satisfied with whatever sum happens to have been paid in at any given time; at the close of the prescribed term of payment, for that would be to raise a condition which would be no condition, — which would always be performed, which could not fail of performance. The amount paid in would always be paid in. Here the statute mentions a "whole amount" which, perchance, may not be paid in. That is an amount which is fixed and designated from some other circumstance than that of having been paid.

That circums tance which raises its designation is easily apparent from the provisions already exhibited from the articles of association and the by-laws. It is the circumstance of having been determined by the Board of Directors and proposed to the individual stockholders. It cannot be any other upon the reason of the thing. And authority, the authority of the Supreme Court of the United States, is to the same effect. In Delano *v.* Butler, as before cited, the opinion declares "that three things must concur to constitute a valid increase of the capital stock of a national banking association." "2d. That the whole amount of the proposed increase shall be paid in as part of the capital of such association." (118 U. S. p. 649.)

XVIII. "And no increase of capital shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the comptroller of the currency, and his certificate obtained specifying the amount of such increase of capital

stock, with his approval thereof, and that it has been duly paid in as part of the capital of such association." (R. S. § 5142.)

"Such increase!" What increase? Why, the increase proposed to the stockholders and accepted by them. And no other. The whole proposed increase (in this case $500,000) must be paid in: all the proposed 5,000 shares must be taken, by some one, or by many, entitled to take, before there can be any valid increase of the capital. No subscriber is bound until all are bound; until 5,000 shares are bound hard and fast, not merely by subscription; but also by payment, full payment. This is a condition of the defendant's written contract. It is made so by a statute of the United States. It is a substantive, and even capital, direction of an act of Congress; not to be treated as a court might treat a technical difficulty growing out of the ancient rules of the common law, or arising in any other way. (U. S. *v.* Curry, 6 Howard, 106, 113.)

XIX. The condition of law, in this case, positive, statute law of the United States, was that there should be no valid increase of capital stock until the whole amount of the proposed increase had been paid in. There was never any increase proposed save an increase of $500,000; and that sum never was paid in. The contract agreed to between this bank and this defendant was never performed by the bank and no action thereon can be maintained.

XX. What did take place was as follows: November 18, 1881, the bank failed and passed out of the control of its Board of Directors into the custody of the Comptroller of the Currency. It was overwhelmingly insolvent. Its doors were closed against customers, and remained so closed till March 18, 1882, when the Comptroller permitted the Directors again to resume direction of its affairs.

At that time, November 18, 1881, towards the proposed increase of capital to $1,000,000, that is, towards a new capital of $500,000, there had been paid in the sum only of $461,300, and no more was ever afterwards paid in towards that increase.

XXI. After this, November 18, negotiations went on between the Directors and the Comptroller; and on December 13, 1881, certain votes were passed by the Directors which on the same day were communicated by copy to the Comptroller of the Currency. These votes recited these facts: —

XXII. (1) That it was voted by the Board of Directors on

September 13, 1881, that the capital of the bank be increased to $1,000,000, or by the sum of $500,000.

(2) That the stockholders were duly notified of said vote; that is, of the above proposed increase and of its amount.

(3) That of that proposed increase, $461,300 had been paid in, and the remainder, $38,700, had not been paid in.

Take notice. These two sums, $461,300 and $38,700, have relation to each other as the two parts of the $500,000, the amount of the increase which on September 13, 1881, was determined by the Directors and thereafter proposed to the stockholders, and not otherwise.

That is to say: It was duly certified to the Comptroller that an increase of the capital of this bank in the sum of $500,000 had been proposed to the stockholders, and that the whole amount of such increase had not been paid in.

XXIII. Here it is to be noticed that the only authority given by section 5142 to the directors to notify the Comptroller in the matter of an increase of capital stock, is authority to notify the Comptroller that the whole amount of a proposed increase has been paid in. No such authority is conferred upon them in the case of a failure to pay — total or partial.

But waiving that objection, it is clear that in such case of non-payment they have authority to certify merely the facts, and nothing more. And this authority they exercised and exhausted in certifying the facts already herein recited, namely, those facts which ultimate into this fact: That an increase of capital in the sum of $500,000 had been duly proposed to the stockholders and had not been paid in.

This is all the fact which the Comptroller had before him on December 16, 1881, in these premises.

XXIV. But the Directors went beyond certifying to these facts. They entered into action, legislative action it would seem.

XXV. They voted (1) to cancel and deduct from an increase of capital stock which had been proposed to the stockholders, an increase to the sum of $1,000,000, the sum of $38,700.

This, however, could not make the increase which had been proposed any the less.

XXVI. Then (2) they voted, that the paid-up capital stock of this association amounts to $961,300.

A vote wholly *ultra vires*. A vote wholly incorrect and so known to the Comptroller. For this reason, if for no other. On that day the Comptroller had not approved any of this increase; and until he did approve, there was no valid increase. All through December 13, yes, through the 14th and 15th and into the 16th, the stock of this bank stood where it was on and before September 13, at $500,000, and the Comptroller knew that fact.

XXVII. Then followed another vote equally *ultra vires*, equally nugatory with the last: to this effect (3) that the Comptroller of the Currency be notified that the capital of this association has been increased in the sum of $461,300.

How could the Comptroller reconcile this recital with the fact that there could be no increase of capital, until after he had acted in the matter?

XXVIII. This vote recited also (4) that the whole amount of said increase has been paid in as part of the capital of the bank.

But it did not recite that said increase of $461,300 had ever been proposed to the stockholders. It recited nothing which broke or diminished the force of the facts previously certified, to the effect that an increase of $500,000 alone had been proposed to the stockholders and that the whole amount thereof had never been paid in.

XXIX. It is very easy to state what course the directors ought to have taken, if they wished to avail the bank of this incomplete contribution to a proposed increase of half a million. Down nearly to November 18, payments thereto continued to be made, and neither they nor the subscribing stockholders were bound to infer that the increase would not be completed. But by December 13, this state of things had given place to another; and it was known that no more payments to that increase would be made.

XXX. In that condition of things, if the directors desired an increase of capital in the sum of $461,300, the statute and all that the statute contains — articles of association and by-laws — required that they should determine upon an increase in that amount and propose that increase to the stockholders in their individual capacity; the associated body, the corporation *qua* corporation, had nothing to do with the matter, — the proposal should be to each stockholder.

XXXI. The only objection to that course now is the only objection which could have been made then, and which undoubtedly was made and prevented that course from being taken.

It is that the paying subscribers would not at all have assented to that proposed increase. Well! It was their statute right to refuse such assent, and they were unlawfully deprived thereof.

And if ever stockholders could be entitled to the privilege of retracting from a subscription to the increased capital of a corporation, the stockholders of this bank, who made such subscription before November 18, 1881, were entitled to that privilege after that day.

When this increase was proposed, this stock was desirable, was worth 106 in the stock market. Thereafter the original stock was a minus quantity of nearly 500 per cent.

This great change ought of itself to invalidate a subscription made before it took place, and when it could not be anticipated, even if it had been made and paid in complete compliance with the requirements of law. Insolvency, overwhelming bankruptcy of a national bank, unknown at the time of a subscription to an increase of its capital, ought to authorize a retraction from such subscription when discovered.

XXXII. It certainly was not the time to make stockholders participants in an increase of capital which had never been proposed to them; to make them contributors to such increase without their assent. Let the real effect of the action of December 16, 1881, be noted. On the morning of that day, certain shareholders of this Pacific Bank were creditors of that bank to a large amount, $461,300. Before night, they had, without their consent given or even asked, been transformed into shareholders of the bank to that amount, $461,300, with a personal liability as such shareholders, over and above that sum, of double its amount, $922,600. They had consented to take stock in a bank supposed to be solvent and prosperous. They were compelled to take stock in a bank hopelessly insolvent. A certain increase of capital had been proposed to them and they had consented to take part in it. It had never been paid in; and thereupon the statute forbade it to be deemed a valid increase. Thereupon another increase was substituted in its place; an increase never proposed to them, and never consented to by them, was foisted upon them in direct disregard of the

requirement of the statute, that in order to a valid increase of the capital of a national bank the whole amount of a proposed increase must be paid in. And meanwhile, that is, between the assent to the proposed increase and the action of officials trying to bind them to another increase, the insolvency of the bank had intervened.

XXXIII. The plaintiff seeks to imply the consent of this defendant to the implied contract which he here sets up; a contract to participate in an increase not proposed to the defendant by the vote of September 13, 1881 (or by any other vote), and never accepted by the defendant in writing. Certainly here the burden of proof lies upon the plaintiff. He must, by positive proof, establish the implied contract of which he wishes to receive the advantages. He must show that the defendant has consented to take what he is trying to fasten upon him.

XXXIV. Certainly, down to December 16, 1881, this defendant had never assented to take part in the increase of capital which the plaintiff sets up as having been made on that day. He knew of no such increase at that time, nor till long afterwards. Indeed, it is indisputable, that on December 16, 1881, none of the stockholders in this bank had assented to a proposed increase of stock in the sum of $461,300, for no such increase had even been proposed to them. The opinion in the case of Delano *v.* Butler admits the correctness of this statement. For it finds such increase *not valid on that day*, but validated thereafter. Such subsequent validation it finds in corporate action of January 10, 1882, and in still later individual action of the corporator there concerned. This later corporate action has already been shown to be wholly nugatory in the matter. The individual action in the present case has been considered in another brief, and also will be briefly, hereafter, in this.

XXXV. Here there is to be presented to the Court, as matter of wide and weighty public policy, a question of more importance than that of the effect in law to be given to the defendant's action, taken after the only approval ever given by the Comptroller of the Currency, to the increase of capital stock in this case.

This question is, whether, under the statutes of the United States, any increase of the capital stock of a national bank can be made valid by the assent of individual shareholders given long after such approval, and to be shown by parol?

XXXVI. The principle is conceded to the other side, that, where the corporate action is regularly taken, it cannot be avoided by an individual shareholder upon the ground of fraudulent conduct as to him on the part of officers of the corporation.

But that is not this case. Here the increase of capital stock on December 16, 1881, was not regular, was not valid, on the face of the papers. This Court so concludes in its decision. That is *res adjudicata.*

XXXVII. Now, how can an increase, not valid when approved by the Comptroller (for want of performance of the prerequisite conditions), be validated afterwards by the individual action of separate stockholders?

Must there not be an approval by the Comptroller of an increase in a known sum? How can the sum be known unless the papers submitted to the Comptroller show that the shareholders have already assented (by proper action) to the increase. Every one failing to assent afterwards alters the amount of the increase; and when all these failures are ascertained, and not before, the requisite approval can be given.

XXXVIII. It is law, let it be assumed, that an increase of capital stock as now under consideration, good on its record, cannot be invalidated, as to particular stockholders, by parol proof of what passed between them and certain officers of the corporation.

Is it not, by parity of reasoning, equally good law that such increase, not valid on its own record, when it receives the last sanction by law provided for its affirmance, cannot be validated afterwards by parol proof of the subsequent individual action of individual stockholders?

XXXIX. Will this Court deliberately and conclusively sanction a construction of the relative statute provisions, which will allow the Comptroller of the Currency to approve an increase of capital stock never proposed to the stockholders, *upon the chance of picking up the assent of every one of them long afterwards?* Was that the intent of the statute?

The record of such an increase, as prescribed by statute, closes with the approval of the Comptroller. If that record does not then show a valid increase, how can it be made valid by subsequent parol action?

XL. In this case the record fails to make such showing.

It does not show an increase in the sum of $461,300 ever determined by the Directors and thereafter notified to the stockholders. It shows no PROPOSED INCREASE WHATEVER wholly paid in.

XLI. When the defendant subscribed for his stock, in September, he was told by the president that the whole subscription had been taken. (This, however, is of no great importance. His subscription was conditional, upon a contingency to be thereafter determined: just as binding — provisionally — upon the very first subscriber, as upon the very last.) There was no information obtained by him, or to be obtained by him, to the contrary when he paid his subscription October 1. It was the same condition of things when he took the certificate of his ownership of the new stock November 5. If he had then made inquiry and obtained true answer, he would have learned only that the undertaking was, though not yet complete, still in progress; that its term — what the Directors deemed a reasonable time — had not yet expired. And until that reasonable time had expired and its expiration had been made known to him, he had no right to retract from the engagement to which he had subscribed.

He was still under the impression produced by the statement of the president that the whole subscription had been taken, and that he had no right to retract; that he was already bound — provisionally — by his subscription. And without doubt he was, at that time, so provisionally, conditionally bound.

XLII. And he was also under something much more powerful than a mere impression on his memory. He was under the protection of the law, of a provision in a statute of the United States. That statute had provided and declared that he should not be bound by his subscription to an increase of the capital of this bank until the whole increase to which he had subscribed had been paid in. And the law had provided a central officer and charged him expressly with the due execution of this provision of law. The statutes in relation to national banks, in their very first section, had provided for the appointment of a Comptroller of the Currency. And according to those statutes, there was to be no valid increase of the capital of any national bank until the whole amount of such proposed increase was paid in; and that Comptroller had certified that fact, with his approval.

XLIII. This was the protection over this defendant on November 5, 1881, and thenceforward to December 16 following. He had a right to walk securely under it. He had a right to take the certificate which was offered him, though the issue of such certificates at that time by the authority of the Directors of this bank was highly irregular, and has some aspect of an attempt prematurely to make stockholders. But this defendant did not compromise himself by taking it. If in due time the whole required amount should be paid in, and the Comptroller of the Currency should approve the proposed increase, the certificate would come into full force according to its terms. If the whole required amount should not be paid in, of course the Comptroller would not approve of any increase. Then the certificate, as such, would be valueless. It would, however, in that case, be an excellent voucher of his payment of his subscription, properly to be surrendered, when the bank was ready to return to him his subscription money. Till then he had the right to hold it, as a piece of evidence, and the best possible piece of evidence, of the transaction between him and the bank, and his relation in that business to that association.

XLIV. This brings the action of the defendant down to December 16, 1881, and there are two reasons for the statement that he did not assent to that increase on that day. First, as the Supreme Court has decided (Delano *v.* Butler, 118 U. S.), there was no valid increase of this capital on December 16, 1881, certainly not until after certain action taken by a meeting of the stockholders of this bank on January 10, 1882. And second, because the defendant testifies that he never knew of the increase, in which the plaintiff now seeks to involve him, until that day in January, 1882.

XLV. There is in this case no need to argue that the action of the stockholders' meeting of that day had no effect whatever to make valid the action of December 16; for it is admitted in this argument that the association, as such, had no authority in relation to the increase of capital.

XLVI. And certainly on the day of that meeting he gave no assent to this increase. On the other hand, he repudiated all his part therein. He told the counsel of the bank he would not recognize these fifty new shares as valid. His own counsel spoke publicly to that effect in the meeting. He refused to vote upon this

new stock. He thus refused, while actually voting upon his old stock. Here was, on his part, repudiation, open repudiation, prompt and immediate upon his obtaining knowledge of the facts.

XLVII. And his after action is to the same effect. The defendant, in the meeting of January 10, voted against laying an assessment to restore the capital of the bank. But the majority was against him; the assessment was laid. He had participated in that action, although by an opposing vote. Still he had voted: voted on his old shares held as Guardian and Trustee. And with that loyalty and consistency which mark his character, he came forward in due time to pay his assessment on those same old shares, on those and no others. Here again he repudiates the new shares. And the Directors take knowledge of his repudiation. They have these new shares of his advertised for sale. This, on April 21. Then expired the three months during which the law allowed him to take his election whether or not to pay an assessment on those shares. And he elected not to pay; and the Directors knew of that election, and acted officially upon that knowledge.

XLVIII. Meanwhile, as the case shows, his intent was single, uniform, and persistent. It was not to recognize those shares as his, as any one's, as having any valid existence or substance.

XLIX. To a suit for the recovery of the subscription money, a return of the certificate may have been a necessary preliminary; and in view of such suit actually to be brought, the certificate was eventually returned.

L. But to a valid repudiation of these new shares, the defendant was advised by his counsel that such return was not necessary. The creation of this stock had been in a manner not authorized by statute, where statute alone had authority; and such pretended creation was null and void as to this defendant.

LI. Certainly, the return of the certificate was not necessary, nor could it have been helpful to any action which the Directors could have taken in the premises. They did not need it, even in the capital action which they went forward to take upon these shares. Without a return of the certificate, they advertised these shares for sale. Without the certificate they might have sold them and made a good transfer of them on the books of the bank, evidenced also by a new certificate.

LII. The retaining of the certificate in no way fortified the defendant's title as a shareholder. Let us suppose that other parties, instead of, and even against, the defendant, had sought to invalidate the creation of this new stock. Let us suppose the financial result to have been the opposite of what it really was — complete success, instead of complete collapse and ruin. Then suppose that the old shareholders who did not subscribe to the new stock, the non-subscribers owning 387 shares, had come forward to deny the validity of these 4,613 new shares, including the defendant's fifty. They might have done so under the process of *quo warranto* or some equivalent form of proceeding. And the holding, the retaining of the certificate by this defendant would not have strengthened the defence against such attack. No! not a particle — not an iota.

LIII. And it is respectfully submitted that against such an attack it would be no available defence that this new stock was *de facto* stock. In such a controversy, the quality which is known as *de facto* would have no recognition; nor even that quality which is designated as *de jure*. For stock in national banks of the United States is not a thing which can be brought into being by purely individual contract and convention. It is not even known to the unwritten law, the *jus*. Its existence depends upon acts of Congress. It is the *lex* — the *lex scripta* which authorizes its creation; and in order to be valid, it must be shown to exist *de lege*, to have been created in accordance with the provisions and requirements of the statutes of the United States.

LIV. In any event, it is certain that the holding of a certificate of ownership of the new stock, in such a controversy, would be wholly an insignificant and undetermining fact. Scovill *v.* Thayer, 105 U. S. 143 (149).

LV. Especially would it be so if the fact were shown, which was the fact in this case, that the certificates were prematurely issued; were issued not only before the stock had been created by the approval of the Comptroller, but also before the facts which could authorize that approval had come into existence. The receivers of those certificates were ignorant of the non-existence of these authorizing facts, and had the right to presume under the statutes of the United States that those facts already existed, or would soon exist. Not so the Directors; they had no right in the then existing condition of the bank, as

actually known to them, or as ought to have been known to them, to hasten to make new capital and new stockholders in advance of the full performance of the requirements of the statute thereto. These certificates, on November 5, 1881, when issued, had no legal force or validity, save as vouchers of payment under the subscription started on September 13 of that same year. They could not then evidence the creation of new bank stock, and for that purpose were wholly void.

LVI. The return of the certificate would not have authorized the Directors to have taken the name of the defendant off from the stock ledger. They could not have ventured to decide in the defendant's favor all the doubtful questions involved. So far as the capital is a trust fund, as contended by the plaintiff, so far the Directors are trustees, and obliged to hold it at their peril. Furthermore, they could not take the defendant's name from the list of stockholders till they were ready to restore to him the price paid for his stock. They could not keep his money and obliterate his stock. The first act of the Directors in recognition of a return of the defendant's certificate would have been a return of his money paid for the shares certified.

Before doing that, how could the Directors have notified the public or the creditors of the bank, that, as to his new shares, the defendant was no longer a shareholder?

LVII. How would they have thus notified in any event? The argument for the plaintiff implies, is pervaded with the implication, hardly ceases from the intimation, that the non-return of the defendant's certificate, in some way, misled the public or the creditors of the bank to their loss. But he does not tell how such a result was worked out. Apparently he would have the Court imagine that immediately upon the receipt of such a certificate the Board of Directors would have directed the cashier to cancel on the stock ledger all the shares included in the certificate returned, and at the same time by circulars to the creditors, or by publication to the public, to have made known the cancellation of those shares and the withdrawal *pro tanto* of so much supposed capital from the bank. Was anything of this kind done?

Judicial records give us an answer. Mary J. Eaton in writing demanded back her money on January 10, 1882, and soon after brought suit for the same. What action followed it? The bank, whoever represented it, neither returned to her her subscription

money nor cancelled shares standing in her name on the stock ledger. The bank went straight on holding her to all the liabilities of a shareholder, and it is undeniable that the Comptroller of the Currency would allow no other action. He is to-day carrying to the court of the last resort his assertion that she is still a shareholder. He treats her whole conduct as nugatory; and so he would have treated a return of his certificate by this defendant.

LVIII. The counsel for the plaintiff seeks to strengthen the plaintiff's case by asserting that the certificate of the Comptroller to the increase of the capital is conclusive. But the statute does not declare it conclusive; and for whatever other purpose it might be deemed conclusive, it cannot be held conclusive to the effect of making this defendant a stockholder in the increase certified. It does not and can not certify his assent to that increase; and without the assent which the statute requires to make it operative, it is not conclusive nor effective at all. The Supreme Court of this State have decided to that effect. In their opinion it does not include the assent of Miss Eaton, who paid a portion of the increase certified.

LIX. The Supreme Court of the United States accept this view. Their opinion declares that of the three things which "must concur to constitute a valid increase of the capital stock of a national banking association," there is "1st. That the association in the mode pointed out in the articles . . . shall assent to an increased amount."

And the opinion does not assert that this assent is conclusively shown by the Comptroller's certificate of December 16, 1881. It admits that the assent of the association required by law had not been given when that certificate was issued. It finds that assent as a subsequently occurring fact, its date precisely fixed and known beyond dispute, to wit, on January 10, 1882. The opinion states as follows:—

"A regular meeting of the stockholders was called by public notice." "At this meeting official communication was made that . . . the increased and paid-up capital stock of the bank had been fixed at $961,300." "At this their annual meeting," "the stockholders, by a vote, that was almost unanimous, *assented* to the first branch of the alternative." (118 U. S.)

LX. Here the Supreme Court decline to rely upon the Comp-

troller's certificate of December 16, 1881, as conclusively establishing the increase of capital stock alleged by the plaintiff. They find that it did not establish it. It did not certify the very first essential requisite thereto. That essential, the Supreme Court find, was performed afterwards. The assent of the association to that increase the Supreme Court searches for *aliunde*, and finds by evidence dehors the certificate, in action of the bank subsequent by some weeks to the certificate's date. If the assent of the individual stockholder be substituted, in the above proposition, for the assent of the association, as this argument does substitute it, the reasoning is equally applicable. The assent of the individual stockholder (if any) was even later than that of the association.

Evidently that tribunal regards this certificate of the Comptroller as falling within a principle of law very familiar to our national jurists, a principle rigidly applied even to judical tribunals of the United States, and of course all the more to mere executive officers, to this effect. Being of limited jurisdiction, the presumption in every stage of the cause is that it is without their jurisdiction, unless the contrary appears from the record. Bors *v.* Preston, 111 U. S. 255.

Thus has been shown ample ground for a judgment in this case for the defendant. The contract, the express contract, into which he entered with the Pacific National Bank in September, 1881, was never performed by that bank; and no liability therefrom can be raised against the defendant. The contract, which the plaintiff seeks to raise by implication against him, has no existence in fact or law. The defendant never consented to it in fact. And the law has no favor for it. The statute is against it. The policy of the statute is against it. The provisions of the statutes are against it. It cannot be created by weak, feeble implication. And weak, very weak, very feeble implication is all that the plaintiff has shown in its support.

Part Second.

The statutes raise other objections to the maintenance of this action. To this counsel they seem unanswerable.

They are respectfully submitted as follows: —

LXI. In the condition of this bank on November 18, 1881, as existing and known to the Comptroller of the Currency, it was

his duty, within the true intent and meaning of the statutes, to appoint a receiver who should wind up the business of the bank. R. S., sections 5227, 5228, 5234; 1876, June 30, section 1.

LXII. If, in that condition of the bank, he was authorized to do anything else than thus to appoint a receiver, then his first duty was to take measures for the restoration of the lost capital of the bank (supposing, as the action taken does suppose, that section 5205 applies to the event of capital totally lost). Any duty which he owed to the old capital had priority, in the intent of the statute, to any duty in favor of capital not yet existing. See the intent of section 5205 as set forth in the report of the Comptroller recommending its enactment. (November 20, 1872.)

LXIII. The statutes do not authorize the increase of the capital of a bank which has failed to redeem its circulation and is hopelessly insolvent.

LXIV. If such a bank is to be allowed to go on in business at all, its first step must be a compliance with the requirements of section 5205, a making up of the deficiency in its capital. The section was recommended as a measure by which banks with impaired capital might be prevented from doing an illegitimate business. (See report of November 20, 1872.)

In this case the two steps taken by the Comptroller, though of the same date, and probably in fact simultaneous, were in sequence. First the capital was increased; and then an assessment to restore its whole amount, old and new, as lost, was required. (See statement of facts.)

This sequence of action was never contemplated, and is not authorized by statute. It works a great wrong to stockholders. These stockholders, not a mere majority, but every individual, before assenting to the doubling of their stock, had a right to know that their old stock was altogether lost; that it was nothing but an indebtedness on their part in double its sum. Sound public policy requires this construction of the statute.

So also the words of the section. If the capital stock is not within a prescribed time restored, a receiver must be appointed "to close up the business of the association." (R. S. § 5205.) Does the law authorize an increase of capital stock while such appointment of a receiver is pending? While the original capital is still impaired: still waiting to be restored?

The word "increase" must be held to its natural meaning as

applicable to something now existing: it must not be deemed the equivalent of "creation." It does not designate an entirely new creation. Where no stock now is, there there can be no increase of stock.

LXV. This proceeding of the Comptroller was taken under section 5205, as appears on its face. The Comptroller's letter making requisition for the assessment in terms pledged that officer to give the bank laying the assessment the full benefit of the conditions of that section.

The first of those conditions was that the bank should have, after laying that assessment and giving notice thereof to its stockholders, three months in which to collect the same without proceeding to sell the shares; and thereafter (see amendment of 1876, June 30, section 4) should have thirty more days, after giving notice of such intention, at the end of which it might sell the delinquent shares.

The second of these conditions secured to the bank the privilege of going into voluntary liquidation as provided by R. S., section 5220.

LXVI. The action of the Comptroller in appointing a receiver on May 22, 1882, was in disregard of both these conditions of section 5205, and of the Comptroller's pledge to observe them.

On May 22, 1882, the process of making up the lost capital had not been completed. The sale of delinquent shares was still pending, advertised to take place May 31.

On that day (May 22), the bank had not refused to go into liquidation. On the other hand, on May 20, Saturday afternoon, when its Directors voted to close its doors, they also voted to go into liquidation; a first step in that process; anything rather than a refusal to move in that direction, which refusal is what section 5205 calls for as a condition to authorize the appointment of a receiver.

LXVII. The Comptroller having, on December 16, 1881, taken action under section 5205, and pledged himself to the bank to comply with the conditions of that section, could not lawfully avail himself of authority under any section to appoint a receiver, while the conditions precedent to that appointment raised by section 5205 had not been fulfilled. The specific case provided for by section 5205 was in hand, and could not be displaced nor governed by any more vague and general provision of the statutes, such as the first section of the Act of 1876, June 30.

LXVIII. The opinion in Kennedy *v.* Gibson, 8 Wall, 498, does not seem to establish the principle, as stated by the counsel for the plaintiff, that the appointment of a receiver cannot be contested by a stockholder. The head-note shows no such ruling, and the only remark in the opinion touching that question is to the opposite effect, as follows: —

"The facts necessary to warrant the appointment of a receiver are sufficiently set forth."

That is, the question of their sufficiency would be considered and determined by the court.

LXIX. The agreed statement shows that the only ground supporting the appointment of a receiver on May 22, 1882, was that the Comptroller was then satisfied of the insolvency of the bank; ground specified in the first section of the act of June 30, 1876. Waiving now the objection that on May 22, 1882, the only provision of law open to the Comptroller after his own action of December 16, 1881, was section 5205 of the R. S., it is fit to consider what the action actually taken on May 22 fairly involved. The insolvency of the bank was not a new fact of May 22. It had been fully developed and laid before the Comptroller on November 18 preceding. The Comptroller recognized this fact on December 16, 1881. It was the basis of his requisition for an assessment. After November 18, 1881, the bank made no new losses. The whole amount of debt contracted by the bank after November 18, 1881, and left unpaid May 22, 1882, was within $200,000.

LXX. Now the liability which the plaintiff is seeking to enforce is the liability raised by R. S., section 5151, where it is defined as an individual responsibility "equally and ratably, and not one for another for all contracts, debts, and engagements of such association to the extent," etc.

LXXI. The more ordinary definition of a liability like this, under the laws of the several states, when the several states exclusively authorized and controlled banking corporations, was a limitation of such liability to contracts, engagements, and debts, entered into and incurred while the defendant owned the stock on which his liability was predicated. Apparently this was the full extent of the liability raised by R. S., section 5151. Another provision was deemed necessary to enlarge this liability. Section 5139 expressly provides that every person becoming a shareholder by

a transfer of stock "shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares." This cumulative liability is thus expressly created, because otherwise it would not exist. It could not be raised save by substantial, positive enactment.

And it is not by any substantial enactment imposed upon the holder of newly created stock. The first holder of that stock succeeds to no liability. He is held to answer only for what section 5151 deems his own contracts — those made after his stock exists and while he continues to hold it.

LXXII. The defendant's new stock (if he had any) can be held only for debts unpaid, contracted after March 17, 1882 (this, in this relation, being the same date as January 10, and in fact as November 18, 1881), that is, for only $200,000, or less than one fourth of the aggregate stock of the bank as the plaintiff maintains and the present thought admits.

LXXIII. This objection does not seem to be foreclosed by the decision that the order of the Comptroller of the Currency for the enforcement of the personal liability of each stockholder is conclusive upon the stockholder (supposing now the defendant to be such). In that case the defence set up was of an incorrect computation; incorrect in matter of fact. It is that allegation of incorrectness and that only which the Court refused to consider. In the present case the defendant alleges error of law apparent on the record. The record shows no contracts, debts, or engagements entered into or incurred after this stock came into existence (if it does exist), save to an amount not exceeding $200,000. Consequently this defendant's personal liability on this new stock cannot exceed $\frac{200,000}{961,300}$; cannot equal twenty-five per cent.

THOMAS H. TALBOT,
BENJAMIN N. JOHNSON,
of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 957.

Submitted under Rule 20.

WILLIAM ASPINWALL, PLAINTIFF IN ERROR,

vs.

PETER BUTLER, RECEIVER OF THE PACIFIC NATIONAL BANK OF BOSTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

ARGUMENT FOR DEFENDANT IN ERROR BY A. A. RANNEY.

SUPREME COURT OF THE UNITED STATES.

WM. ASPINWALL IN ERROR *v.* PETER BUTLER, RECEIVER.

Submitted under Rule 20.

ARGUMENT OF THE DEFENDANT IN ERROR.

The general facts correspond to those found in the case of Delano *v.* Butler, 118 U. S. 634. The Pacific National Bank on Sept. 13, 1881, had a capital stock of $500,000, divided into shares of $100 each. The directors on that day, acting in pursuance of a power with which they were clothed by virtue of the articles of association, voted that the capital stock be increased to $1,000,000, the maximum limit. The stockholders were entitled at their election to take at the par value a number of new shares equal to their present holding. They were notified of the vote, and of their said pre-emptive right. Oct. 1, 1881, was named as the date at or before which the money was to be paid, with a right to anticipate payment and have interest to that date. A part of them proceeded to exercise their rights, by paying in the money respectively for the shares to which they were legally entitled, to the number of 4,613, the aggregate money paid being $461,300. There was a failure to get the rest, and on Dec. 13, 1881, the directors, by vote of that date, passed in the exercise of a supposed competent authority, reduced the amount first voted, and the increase was effected, limited to the sum paid in ($461,300). The Comptroller of the Currency, upon due notice, gave on Dec. 16, 1881, the requisite certificate, and the association adopted the result. The bank suspended business Nov. 18, 1881, having lost its entire capital of $961,300. It being proposed to resume business again, and the Comptroller of the Currency having made an order, dated Dec. 16, 1881, that the lost capital be restored by means of an assessment to be laid under the provisions of Rev. Stat., § 5205, with the alternative therein named, the stockholders at a meeting duly called and held

on Jan. 10, 1882, laid the assessment by nearly a unanimous vote, and $742,800 of the amount ($961,300) was subsequently paid in. The bank resumed business March 18, 1882, and on May 20, 1882, failed, deeply insolvent. On May 22, 1882, a receiver was appointed to wind up the bank. On Nov. 27, 1882, the Comptroller passed an order to enforce the individual liability of the stockholders to the full amount of the par value of the stock held by them at the date of the final failure. On Sept. 13, 1881, the plaintiff in error owned as guardian and trustee fifty shares of old stock. Upon receiving notice of the vote of the directors of Sept. 13, 1881, he wrote an agreement, which he framed and signed in his own name at the foot of the same, to the effect that he would, at the time specified, take and pay for the fifty new shares to which he was entitled. On Oct. 1, 1881, he paid the money accordingly, and was then entered on the books as owner of the shares in his own right. On Nov. 5, 1881, he accepted the certificate for the same in due form, which he continued to hold, without any return or surrender of the same, until after the final failure of the bank, when, to wit, on May 22, 1882, he attempted to repudiate by a return of the certificate with a written demand for the money paid (Rec. p. 21). While he was told by the president of the bank, when he paid for the new stock, that all of the amount proposed had been taken (not paid in), so he could have no more, as then desired, he had full information and knowledge of the facts before, or at least on, Jan. 10, 1882. He, with his counsel, attended and participated in the proceedings of the stockholders' meeting held on that day, acting on the old stock only, and voting in the negative on the proposition to lay the assessment. While he expressed to the counsel of the bank (Mr. Stone) an opinion adverse to the validity of the new stock, he never took any steps to repudiate the shares held by him, but continued to hold the same, and was registered as owner thereof, down to May 22, 1882. When the time came for resumption on the part of the bank, he proceeded and drew out the amount of a deposit which he had therein on Nov. 18, 1881, when the bank suspended, and used it, so far as it went, in paying the assessment which had been laid on Jan. 10, 1882; that is, on the fifty shares only of old stock which he held as aforesaid. He fully understood that the bank was only enabled to, and did, resume business and go on as stated, on the basis of a capital stock of $961,300. The court below found Mr. Aspinwall to be the owner individually of the fifty shares of new stock as alleged, and adjudged against him, he taking the writ of error.

The only point in controversy is whether the plaintiff in error was a stockholder owning fifty shares of stock on May 20, 1882, when the bank failed, and its doors were closed to business. All the other facts on which the right of recovery rests are beyond the realm of dispute. I see, however, that the plaintiff in error, in assigning errors under the rule for the purposes of the writ, alleged (Rec. p. 28) three errors (Nos. 2, 3, 4), relating to the notice or order of the Comptroller of December 16, and the appointment of the receiver, as though they were made the subjects of requests and rulings, with exceptions taken. This does not appear by the bill of exception to have been true, unless comprehended in the general request for a ruling that no recovery could be had on the facts specially found (Rec. p. 27). At all events, the proceedings in the appointment of the receiver, and finding due cause therefor, could not be controverted in this suit, as is well settled. The receiver was appointed under act of June 30, 1875.

Cadle *v.* Baker, 20 Wall. 650.

The only questions requiring any discussion is whether, on the special findings of facts, there is anything which, as matter of law, shows that the plaintiff in error was not the owner of the fifty shares of stock, on account of which a recovery is sought, as against the judgment of the court below that he was. It was not contended, and could not be successfully contended, that he was not personally liable, inasmuch as he subscribed and took the shares of new stock in his own name and as in his own right, although in equity the same belonged as a vested pre-emptive right to himself in a fiduciary capacity. While his conduct may be judged of as bearing upon other questions to be discussed, the same as if he was acting as trustee, this will not relieve him from his liability under R. S., § 5151, because his subscription and his conduct and the certificate taken made the stock his own for the purposes of that section at least.

Davis *v.* Essex Baptist So., 44 Conn. 586.

What we have to combat is the case of Eaton *v.* Pac. Nat. Bk., 144 Mass. 260, now pending in this Court on writ of error. The doctrine of that case is arrayed against what is held by this Court in the Delano case.

There can be no doubt that the ground on which Colt, J., decided this case is sound in law, under the established doctrine of the Delano case. That judge held thus (Rec. p. 30): "In the present case I am of opinion that the acceptance of his certificate by the defendant and the retention of the same during the period of reorganization and until after the bank finally passed into the hands of a receiver, in May, 1882, several months after all the facts were within his knowledge, amounted to a ratification on his part of the act of the association and the Comptroller of the Currency as to the increase of stock, and that he cannot now come forward and assert that as to him the increase as finally made is invalid." There is in support thereof the general doctrine stated thus:

"The acceptance and holding of a certificate of shares in an incorporation makes the holder liable to the responsibilities of a shareholder."

Upton *v.* Triblecock, 91 U. S. 47, citing:
Brigham *v.* Mead, 10 Allen, 245.
Buff *v.* R. Co., 14 N. Y. 336.
Seymour *v.* Sturges, 26 N. Y. 134.

We say the Court below did not go far enough.

He should have gone further, and adjudged the liability independently of any ratification, as was done in Butler *v.* Thayer, trustee, an analogous case on the main facts, wherein Nelson, J., rejected the views of the State Court, ruling comprehensively thus, namely: —

"The stock of the bank was lawfully increased from $500,000 to $961,300, and all the proceedings resulting in such increase were valid and binding on the defendant; and, by virtue of his payment of $4,000 on Sept. 28, 1881, he became a holder of forty shares in the new stock, and he was therefore liable to assessment upon those shares as well as upon the forty shares originally held by him." (Printed Rec. p. 48.)

The same ruling was made by Judge Nelson in the case of Butler *v.* Eaton,— an exact duplicate case in all respects with the State Court Eaton case except that the former is brought to enforce the individual liability of the party as stockholder under R. S., § 5151, and the latter was a suit brought to recover back the money paid ($4,000) for the new shares.

All of these three cases of Miss Eaton and Thayer are pending

in this Court on writs of error, with the records printed. Besides these, another suit like that of Miss Eaton (Rec. p. 19) has been brought by Mr. Aspinwall, to recover back the money paid by him ($5,000); and that is pending in the Court below and awaiting the decision here, the theory being that no such right of recovery exists, if he was not made the owner of the stock. There are also numerous other cases — estimated to be some thirty odd in number — now pending and awaiting in the Courts below, some of them brought to enforce the individual liability of stockholders as owners of the new stock, and the others brought to recover back the money paid therefor.

Counsel here united in trying some supposed test cases (the Delano and other cases reported in 118 U. S. 634, 655), hoping to get a definitive adjudication upon questions in issue and common to some three hundred or more cases then pending below. The adjudication made, however, has served to dispose of those cases only in which the assessment laid on Jan. 10, 1882, had been paid. The decision as made has not been yielded to beyond that, as it coupled the proceedings touching the increase of capital with the subsequent conduct of the parties, as working a ratification thereof. Hence this Court is confronted with the same main questions again, and will be until a decision is made which must be recognized as absolutely definitive.

We have stated the above facts to show the present status of the litigation and as reasons for urging a comprehensive adjudication in this case. Both counsel unite in this desire, and trust that the Court will find a justification therefor, and be disposed to comply with the same. We may be permitted to state further: Foreseeing that the argument here would necessarily involve a discussion of the other said cases pending here, we gave notice to the counsel therein of our agreement and purpose to submit this case upon written argument under Rule 20, to the end and with the request that he do likewise with his said cases, so all of the suits here might be argued and determined together. But our efforts in that regard have proved fruitless.

Since the said decision of the State Court in the Eaton case, the case of Winters *v.* Armstrong, 37 F. R. 508, has been adjudged and reported. Also the case of Schieronberg *v.* Stephens, cited therein, not yet, but to be, reported in St. Louis Rep. App.

These cases presented only the question as to whether there was an entire failure of consideration where a projected increase of the

capital stock had aborted and utterly failed before the proceedings therefor had been completed, and when completion was rendered impossible thereafter by the stopping of the bank, and its affairs passing into the hands of a receiver in a winding up process. They were rightfully decided, as the gist of the decisions was that there was such a failure of consideration, vitiating unpaid subscriptions, promissory notes given for the money promised, and giving a right to recover the money when paid, on account thereof. We do not controvert the soundness of the doctrine therein held so far as that. It accords with well-settled principles of law, with the qualifications and limitations made in the following legal authorities, bearing upon the same question: —

Am. Tube W. *v.* Bos. Mac. Co., 139 Mass. 5.
Reed *v.* Am. Tube W., 141 Mass. 454.
Wontner *v.* Shairp, 4 C. B. 404.
Asphitel *v.* Sercombe, 5 Exch. 147.
Johnson *v.* Goslet, 3 C. B. N. S. 569.
Watts *v.* Salter, 10 C. B. 477.
Garwood *v.* Ede, 1 Exch. 264.
Cook on L. of S. & S., § 76, 240.

But inasmuch as the Court (Jackson, J.), in Winters *v.* Armstrong, *supra* (p. 514), also says that there was no conflict between the Delano case and Eaton *v.* Bk., *supra*, we must be allowed to controvert that. In so saying, he must have had in mind, not what this Court indicated in the early part of the opinion, but the ground on which the case was ultimately and definitively decided.

In the Eaton case, the State Court say this as a summary of their conclusions: —

"The vote of the directors of Sept. 13, 1881, was in the nature of a proposal to the stockholders to subscribe for five thousand shares of new stock, and to pay in for it $500,000. It was necessary that the stock should all be taken and the money all paid in before the new stock could be created. It was a condition precedent to the issue of the new stock under this vote that both these things should be done, and that the Comptroller should certify that they had been done, and approve of the increase. The plaintiff paid in her money upon the implied condition that she should not be entitled to new stock unless $500,000 was paid in and the Comptroller approved of the increase, and also upon the implied condition that she should

not be required to take new stock unless the amount proposed was created."

In substance and effect, the State Court held and apparently adjudged that the increased capital stock was to be effected, and could be effected, if at all, under the vote of Sept. 13, 1881, at $500,000 only; whereas this is the plainly indicated doctrine of this Court in the Delano case as a virtual adjudication: "Three things are essential to a valid increase of the capital stock; (1) that the association, in the mode pointed out in its articles and not in excess of the maximum provided for by them, shall assent to an increased amount; (2) that the whole amount of the proposed increase shall be paid in as part of the capital of such association; and (3) that the Comptroller of the Currency, by his certificate specifying the amount of such increase of capital stock, shall approve thereof, and certify to the fact of its payment.

"In the present case, the association did in fact finally assent to an increase of the capital stock, limited to $461,300. That amount was paid in as capital; and the Comptroller of the Currency, by his certificate, approved of the increase and certified to its payment, so that there seems little room to question the validity of the proceedings resulting in such increase. All the requisitions of the statute were complied with. The circumstance that the original proposal was for an increase of $500,000, subsequently reduced to the amount actually paid in, does not seem to affect the question; for the amount of the increase within the maximum was always subject to the discretionary power of the association itself, exerted in accordance with its articles of association, and to the approval and confirmation of the Comptroller of the Currency."

To be sure, they say in a subsequent paragraph this: —

"It will be observed that, without waiting to see what the future action of the association and the Comptroller of the Currency might be on the question of the ultimate amount of the increased stock, the plaintiff in error paid for his shares and accepted his certificate. This he did in legal contemplation, with knowledge of the law which authorized the association and the Comptroller of the Currency to reduce the amount of the proposed increase to a less sum than that fixed in the original proposal of the directors; and such payment and acceptance of certificates in accordance therewith might amount, under such circumstances, on his part to a waiver of the right to insist that he should not be bound unless the whole amount of the proposed increase should be subscribed for and paid in."

But we regard what the Court say as to the right of the stockholders to insist upon the increase being $500,000, as an alternative and further answer to the adverse contention then made, upon an assumption made for the purposes of the argument only, as otherwise the assumption would conflict with what had been already indicated as sound doctrine.

The State Court concede the power claimed by us, and apparently sanctioned by this Court in the Delano case, to the extent stated in this paragraph, namely: —

"By the articles of association of the bank, 'the capital may be increased according to the provisions of Sect. 5142 of the Revised Statutes to any sum not exceeding ten hundred thousand dollars,' and the board of directors shall have power 'to provide for an increase of the capital of the association, and to regulate the manner in which such increase shall be made.' The vote of the directors of Sept. 13, 1881, to increase the capital stock to $1,000,000, which was an increase of $500,000, and the subsequent vote of Dec. 13, 1881, to increase the capital stock by $461,300, instead of $500,000, were therefore both within the power of the board."

But they seem to say that a reduction in the amount could be made and the increase effected at the less sum so as to bind the stockholder only by means of an abandonment and the institution of another proposal with proceedings *de novo*, or what would be equivalent thereto; to wit, the assent or acquiescence of each individual stockholder at that time. Whereas this Court say (p. 649), on the same state of facts on that point, that the "amount of the increase within the maximum was always subject to the discretionary power of the association itself," etc.; and, again, later (p. 650), "the law authorized the association and the Comptroller of the Currency to reduce the amount," etc.

The State Court treat the vote of the directors of December 13 as in law an abandonment and the making of a new proposal.

Whereas this Court in the Delano case presumably were dealing with the case as presented to them on the record, and seem to have been then of the opinion that the discretionary powers existing authorized the reduction made and what was done, as a competent exertion of the same, the authority given operating as an assent in advance on the part of the stockholders, by virtue of the charter, as the fundamental contract of membership, and the vote of the directors of December 13 being a modification of the plan, and not an

abandonment, and what was done pursuant thereto as being an execution of the plan thus modified, all in the exercise of supposed adequate powers in that behalf. This is our contention now, the same as it was in the argument of that case.

There would seem to be no doubt that the action taken and the result accomplished was *intra vires* of the association, of the directors, and of the Comptroller of the Currency. The State Court, in what they hold, seem to imply that, if they do not directly and expressly so hold.

"Undoubtedly, the public, in dealing with a bank, do rely to some extent upon the certificate by the Comptroller of the amount of the increase in the capital stock of the bank, and that this amount has been actually paid in; and, so long as the certificate remains unrevoked, it may be taken to establish the amount of the capital stock of the bank. If the certificate happens for any reason to be false, it is probable that an assessment may be laid upon the shareholders to make up the deficiency in the capital stock. But that the certificate of the Comptroller makes any one a shareholder who is not one, or enables a bank to appropriate a debt it owes to a payment for stock, or to treat one of its creditors as a shareholder, is a proposition to which he cannot assent."

What they thus say would seem to come to this: that the stock as increased was valid as to the public for the purposes of the banking act, perforce of the certificate of the Comptroller, while as to each individual stockholder the same was *res inter alios*, and he would not be made the owner of the shares for which he paid, in the exercise of his pre-emptive right, unless he elected to so regard himself, and he became such by his consent to or sanction of what was done; and this because of an implied condition to that effect inhering in his expression of his election originally made pursuant to the original vote and notice, their conclusion in that respect being based on the rule of law which allows the Court to raise and read into a subscription an implied condition precedent to the obligation to pay the money.

We shall have more to say on this subject anon. It is enough now to say that the Court then failed, in what they said on this point, to appreciate the full legal effect of the notice of December 13, sent to the Comptroller of the Currency, and of the action of that official thereon, as an accomplished amendment of the charter, wrought by means thereof, and as authorized by law; and that they

also were in error in treating Miss Eaton as a stranger, and not so far a participator and duly represented in the proceedings as to make her a party to them and bound by the result thereof. This Court in the Delano case put the validity of the stock on the higher and broader ground, as having been wrought by proceedings answering the requisitions of the law and the charter.

The issues to be argued are: (1) whether the increased capital stock as effected by the action taken and as adopted then and subsequently by the association was valid; (2) whether Mr. Aspinwall was made the owner of fifty shares thereof, irrespective of his conduct in subsequent ratification of the proceedings. Upon the first question there would seem to be no doubt. This Court has demonstrated that, by a statement and argument already quoted from the opinion in the Delano case, which seems to be incapable of successful refutation. What Pratt on Nat. Banks (Digest), p. 19, note to R. S., § 5142, says, as the law and the practice, to the effect that the increase may be effected at the sum got, if the whole fails for any cause, comes to the same result, also to the effect that, if an increase is not effected *de jure* at all, and the scheme is abandoned, the money can be recovered.

The theory on which the validity of the proceedings is to be upheld is well stated in an exposition of the banking act by Jackson, J., in Winters *v.* Armstrong, *supra.*

"The general government, under whose laws national banking associations are created and their powers defined, has, in and by these provisions of the law, reserved to itself to say, through its designated agent or officer intrusted with the supervision of such matters, when and to what extent such associations shall be allowed to increase or diminish their capital stock, and thus effect radical and fundamental changes in their organization. In and of themselves national banking associations are invested with no power or authority to increase or diminish their capital stock. No such increase or diminution of their capital stock can be legally made by them without first obtaining the direct and positive sanction of the government, expressed and certified by the approval of its Comptroller of the Currency. Every application for such an increase or diminution of their capital stock is equivalent to a request for an amendment of their charter powers in that respect; and all attempts upon their part to effect an increase of their stock without the sanction or approval of the sovereign, signified in the mode and manner pro-

vided by law, are destitute of authority, and wholly wanting in legal validity."

This is not, then, a case where the proceedings are all on the part of the corporation, with certain formalities prescribed for the sake of certainty and for the protection of the public only, but one where the authorized application to the government, called a notice in R. S., § 5142, and the action of the Comptroller of the Currency thereon, constituted an amended charter, with all its contract incidents, with the force and effect of a petition made by the association to Congress and by them granted in the shape of an express act of legislation.

In the other class of cases, it has been well settled that informalities and irregularities in the proceedings, the general action being *intra vires*, are of no avail in collateral suits.

Scoville *v.* Thayer, 105 U. S. 143.
Chubb *v.* Upton, 95 *id.* 665.
Pullman *v.* Upton, 96 *id.* 928.
Upton *v.* Triblecock, 91 *id.* 45.
Cook, § 288, cases in note.

Here the broader rule applies, that an amended charter got on the application of a corporation cannot be assailed by individual stockholders in collateral suits, but they are estopped.

In each of these classes of cases a direct suit is the only mode of remedy to be pursued, and that must be brought in the name and in behalf of the government or the State.

The determination by the Comptroller of the facts essential for his action in giving the certificate is conclusive, because he represents the sovereign with full powers; and such was the manifest policy of the banking act, to which every member is held in law to assent and agree.

Casey *v.* Galli, 94 U. S. 673.
Keyser *v.* Hitz, 2 Mackey, 473.
Cadle *v.* Baker, 20 Wall. 630.
Kennedy *v.* Gibson, 8 *id.* 498.

The State Court in Eaton *v.* Bank, *supra*, virtually concede the conclusive force of the certificate of the Comptroller of the Currency, as to the public and for the purposes of the banking act, while they

place each stockholder contributing the money beyond its reach and effect, on the theory that he is protected from it as against the association by an implied contract between them. But, in thus qualifying the effect of the official proceedings *quoad* all stockholders who do not assent and accept their shares of stock, the State Court leave a very anomalous state of things in respect to the association, as a whole, as to the public, to say nothing of the stockholders who did assent to the reduction. Let us see how that Court stand in their contention and in the results to follow the same. They do not say the increased capital stock limited to $461,300 was void, and that there was consequently a failure of the consideration for which the money was paid. They do not say that the action of the Comptroller of the Currency, in giving his certificate of date December 16, was *ultra vires*, or that the action of the directors of December 13 was *ultra vires*, but concede the contrary thereof (*vide* Morrison *v.* Price, 23 F. R. 247); or that the vote of December 13 was not made effectual because it did not provide for proceedings *de novo*, with the pre-emptive rights of all the then stockholders observed, or the equivalent assent of each of the same to the reduction made, or ineffectual because such assent was not sought. What they do say is what has been already quoted in full. Referring to the same again, it will be seen that the Court appreciated the position of the bank, if left with a valid increased capital stock of $461,300, with no money that it had a right to retain which made the same. They suggest that it might be made up by means of an assessment laid under the provisions of R. S., § 5205. But did it occur to them that that section applied only to original capital stock, on which only fifty per cent. was required to be paid up before the bank could begin business, and the balance of which had not been paid in, and to the impairment of capital generally,—that is, what had been made such *de jure?* The theory of the statute is that there could be no increased capital stock until the money had been paid in as capital and the stock had been created. There could be no such thing as shares of increased capital stock until the money had been paid in and the Comptroller had made them such by his certificate. They must have existence with an owner of the same, before they can be subject to assessment and sale, under § 5205. §§ 5140, 5141, furnish adequate remedies as to original stock not all paid up. But, as to increased capital stock, the case is otherwise. Suppose an assessment was laid. It must be laid, *pro rata*, on all

the stock. Who would be liable to respond as owner on account of the fifty shares standing in the name of Mr. Aspinwall or Miss Eaton? Certainly no one but them, if any one. Whose shares could be sold by reason of non-payment of the assessment when laid? None but theirs, if any. Then it must follow, if the stock existed, that they would be the owners, and that the money paid was capital once, and not a loan or a deposit merely of money creating a debt on the part of the bank. The contention must come to this on the theory advanced,— to wit, that the parties named were owners of the shares of stock paid for; that it was valid stock with owners, and those owners were the parties who had paid the money which alone constituted the same in law. If they could recover at all, it must be for damages occasioned by the fact that the aggregate capital stock was not made $1,000,000 instead of $961,300, as agreed by the association originally, or by reason of the directors making it the latter sum in violation of their duty in the premises. I would have liked it better if the State Court had helped the contention out of the dilemma caused by the theory advanced, by answering the above questions, and said also who on their theory would have been the owners of the disputed shares if the amount had been made up by means of such an assessment as they suggest as allowable. I would like, also, to know why the increased capital stock would not be valid as to the public for all the purposes of the banking act, if it was good for the purpose of applying the provisions of § 5205. Why not for the purposes of § 5151, and for local taxation as well? These were the only ones in respect to which the validity would be of any account as to the public. If it was once capital, why did not the lien of the creditors attach thereto, as a part of the trust fund, like the rest of the capital? Certainly they would not say that the parties could enjoy the benefits to be derived as incidents of ownership as between them and the association, if entitled to recover the money or if actually repaid. On the theory of that Court, the increased capital stock, if valid, is only a mere empty shell or as existing in name only,— less than the shadow of a shade. The money in one breath is capital and the stock created, and in another breath it is no capital and no stock is created. It is capital to that extent that it can be regarded as lost, and not to the extent that it makes the party paying it an owner of the stock which it alone can make or create. This assumption is too unreasonable and too absurd to be tolerated.

The conclusive validity of the increased capital stock means something or nothing.

We insist that the policy of the banking act and the articles of association, constituting as they do the fundamental contract of membership, does not admit of the narrow theory set up by the State Court. The powers granted to the directors are not some of their ordinary powers, but they were special and extraordinary, designed to commit the individual will of each stockholder into the keeping of the directors, and to make their will and determination in the premises as his own. This was done as a matter of policy, in view of the contingencies in the way of a perfected increase of the capital stock, such as a failure for any cause to get the whole amount or a refusal on the part of the Comptroller to approve of an increase except for a less amount, if it was all got. Such occasions would call for the exercise of a sound judgment and a wise discretion, such as would presumably best be found in a part of their own number, the directors, equally interested with them as co-stockholders, to be elected annually, and with all desirable safeguards against an abuse of the power to be found in the power lodged by law with the Comptroller of the Currency. The choice would lie between an entire abandonment and an utter failure of the project, which might be injurious to all, and a consummated increased capital stock at a less sum, which might be just as good as more, the question between the two courses of proceeding to be determined under the circumstances of each case as it might arise and as they might be at the time. It was apparent that in the event that a reduction in the amount was made, the less sum would answer the requirements of the law and the result be valid. Each party who had paid the money would have the same relative interest, and it might be greater than it otherwise would have been, because his share in the reserved fund or surplus might be enhanced thereby. If any stockholder who had contributed money in pursuance of his election, made to avail himself of his pre-emptive rights to new stock, was refractory or obstinate, he should not be allowed to defeat a project by refusing his consent, to the injury and defeat of the rest. Those who had forfeited their privileges had no more rights in the premises, and could not justly complain of the reduction if made. Such contingent events were proper subjects of regulation; and it was never intended to leave it so one or a few men could control the matter in such important

exigencies, any more than in other particulars involved in the general proceedings. It is puerile to raise, as an objection to this theory, the possibly enhanced personal liability, in some future contingent and remote events, as an incident of continued ownership of the shares of stock after they should be created and issued, under the provisions of R. S., §§ 5151, 5205. The effect of the discrepancy would be uncertain and altogether problematical at best. It would presumably be so inconsiderable in amount as to make the difference of liability of little or no account anyway. For counsel to urge this liability as an argument against what would be regarded as a wise rule, on the whole, with all reasons *pro* and *con* duly considered and balanced, is to strain a point unreasonably, if not to become "snappers-up of unconsidered trifles," conjured up in an effort at speculation as to what might or might not occur in the future.

The question is only what was the extent of the discretionary powers actually conferred.

We find first the provisions of § 5142, giving full authority to establish such a policy.

Next, the articles themselves made pursuant thereto, in which occurs the following, after securing an observance of the pre-emptive rights of the stockholders in conformity with the law, and as the only respect in which they were to co-operate in the proceedings, namely: —

"They shall have power to define the duties of the officers and clerks of the association, to require bonds from them, and to fix the penalty thereof; to regulate the manner in which elections of directors shall be held, and to appoint judges of the elections; to provide for an increase of the capital of the association, and to regulate the manner in which such increase shall be made, and generally to do and perform all the acts that it may be legal for a board of directors to do under the Revised Statutes aforesaid; and they shall also have the power to make all by-laws that it may be proper and convenient for them to make under said Revised Statutes for the general regulation of the business of the association and the management and administration of its affairs."

It is to be observed that no by-laws on the subject were required to be made in advance of any proceedings toward an increase of the capital, as is sometimes the case; but the directors were left at liberty

to make such only as they found convenient, and then to make such provisions and regulations afterwards in course as might be reasonable, according to the circumstances as they existed at the time being. It was desirable that one by-law should be made, so as to regulate the mode in which the pre-emptive rights of the stockholders should be exercised, and so as to furnish a convenient and sure means of determining what would work a forfeiture of those rights. Hence this by-law only was made, namely: —

"SEC. 11. Whenever an increase of stock shall be determined upon, it shall be the duty of the board to notify all the stockholders of the same and cause a subscription to be opened for such increase, and each stockholder shall have the privilege of subscribing for such number of shares of new stock as he may be entitled to subscribe for in proportion to his existing stock in the bank. If any stockholder should fail to subscribe for the amount of stock to which he may be entitled within a reasonable time, which shall be stated in the notice, the directors may determine what disposition shall be made of the privilege of subscribing for the new stock."

It was not deemed advisable to put the exercise of the discretion vested in the directors in any strait-jacket in advance, in view of the other contingencies in the way, but to leave it free, subject only to the requirements of the law, the general powers granted by the articles, and the final approval of the Comptroller, when the proposal or application should be submitted to him.

Now, it is a familiar principle that the stockholders are bound by the fundamental contract of membership, they being, like articles of copartnership among members of a copartnership, that they agree to the terms of the charter, and assent in advance to whatever it authorizes to be done and is done in pursuance of powers granted thereby.

As said by Jackson, J., in Winters *v.* Armstrong, *supra*: —

"New subscribers to the capital stock of national banks, whether at their original organization or subsequently, upon a contemplated increase of their capital stock, clearly enter into an agreement or undertaking based upon the charter powers of such associations; and the rights and obligations of such subscribers rest and must be determined upon the conditions and law of the charter as embodied in the banking legislation of Congress."

Not only the original associates, but each new member, agree to the charter and the charter powers.

Ball on Nat. B'ks, note to § 5151.
Curran *v.* Arkansas, 15 How, 304.
Hawthorne *v.* Calef, 2 Wall. 10.
Davis *v.* Weed, 44 Conn. 569, Shipman, J.

The presumption is that the design was to grant a power which was commensurate with what would be required in the interests of success rather than a failure of the enterprise when once started and in progress. Hence the provisions in that regard were wise and prudent.

It is useless to insist in this particular upon the idea that each stockholder had an individual interest in a change so fundamental as an increase of capital stock which was violated. That was a right which could be regulated and controlled by the will of the majority, if the law or the articles so provided. The articles of association here were effectual to that end, made as they were by competent authority.

Railway Co. *v.* Allerton, 18 Wall. 233

In important particulars, especially as to the capital stock, the stockholders are the association to all intents and purposes, whatever may be said of corporate entities in other respects. In Sawyer *v.* Hoag, 17 Wall. 610, this Court, by Miller, J., hold the equivalent of this.

Colt, J., in Morrison *v.* Price, 23 F. R., quotes and applies the principle to this class of cases.

Hence, I insist that the articles of association operated to make the board of directors the representative agents of the whole body of stockholders, of which they were by law made a part (§ 5146), with special and plenary powers in the matter of an increase of the capital stock, in spite of what is said to the contrary thereof in Eaton *v.* Pac. Nat. Bk., *supra*. The point is passed by in the opinion found in that case with a summary disposition of the same as not requiring any attention or discussion (144 Mass., p. 271). It is doubtless true that this is not so in the matter of the discharge of the ordinary duties of the directors, and that they are in that respect only the agents through whom the association acts. In Railway Co. *v.* Allerton, 18 Wall. 233, it is held that directors have no power to increase the capital stock, although the charter declares that *all the corporate powers* of the corporation shall be vested in and exercised

by a board of directors. ~~So~~ But when, as here, the directors are given a direct and exclusive special power, by virtue of an express agreement of the stockholders themselves in a matter which would otherwise rest with them, it is a different case. The association and the stockholders do not stand in the relation of contracting parties in the proceedings only so far as implications arise from duties imposed upon the association in its corporate capacity or entity in executing what the directors in the exercise of their said power determine and the Comptroller assents to.

It is said in Eaton *v.* Pac. Nat. Bank that there was an implied contract to the effect that the increased stock should be made $500,000 or none. The contention is based on these facts, that is to say, (1) the vote and notice, which were these: —

Sept. 13, 1881, the directors of the bank passed the following vote: —

Voted, That the capital of this bank be increased to one million dollars, and that stockholders of this date have the right to take the new stock at par in an amount equal to that now held by them.

The following notice was thereupon sent to all the stockholders of the bank: —

A. I. Benyon, President. J. M. Pettengill, Cashier.

Pacific National Bank, 105 Devonshire Street.

Boston, Sept. 13, 1881.

At a meeting of the directors of this bank held this day it was

Voted, That the capital of this bank be increased to one million dollars, and that the stockholders of this date have the right to take the new stock at par in equal amounts to that now held by them.

Subscription to the new stock payable October 1st. Parties desiring to anticipate payment will be allowed interest to that date at four per cent. per annum.

J. M. Pettengill, *Cashier.*

To this notice in a blank space left for that purpose the plaintiff in error appended this agreement, of his own framing, and not in any prescribed form of subscription for all stockholders to sign, namely,—

"I will take the fifty new shares to which I am entitled, and will pay for them as above.

"William Aspinwall."

On Oct. 1, 1881, he went to the bank and paid the money as agreed, taking a receipt to the effect that it was paid on account of his subscription for new stock. He inquired and sought to get more stock, but was told that it was all taken, not that the amount was paid in. In the Eaton case, the record shows that no subscription was opened or signed by her, while she took the same form of receipt purporting to show that there was one.

Now, is it true that the effect of this was what the State Court say as conclusions?

We say no. In the first place, it is to be said that Mr. Aspinwall was only availing himself of his pre-emptive right in his capacity as guardian and trustee, and agreed to take only what he was entitled to in law,—a right which is defined in law (Cook on L. of S. & S., § 286 and notes; Moraw., §455; Gray *v.* Bk., 3 Mass. 364; Hart *v.* St. Charles St. Ry. Co., 30 La. An. 758). The obligations imposed upon the association by the election made on the part of the stockholder are also as matter of law, and do not strictly rest in contract. They are simply obligations to discharge a duty which the law imposes.

What is the effect of the vote passed? It does not fix absolutely the amount of the increased capital stock or what it must be, if at all. It must be construed as having reference and as subject to the provisions of the charter and the charter powers.

"National banking associations have no authority of law by their own action to increase their capital stock to any amount whatever. They can make no increase to any extent, without the approval of the Comptroller as the representative of the government. His approval confers the right to make and fixes the limit or the amount of such increase." Jackson, J., in Winters *v.* Armstrong, *supra* (p. 518).

Although the directors regularly voted to increase the capital stock in pursuance of authority, the vote is very clearly not *per se* an increase. Until the amount is finally approved and fixed by the Comptroller, there is an element of uncertainty about it (Terry *v.* Eagle Lock Co., 47 Conn. 141). Why must the amount be named to start with? It is for the reason that it is absolutely necessary to do this as the basis on which the stockholders can make their election and its mode of exercise be regulated, with an allotment of the rights and forfeitures determined. It was well known, and would be perfectly well understood, that there were contingencies in the way, such as have been before indicated, which might affect the ultimate amount, subject to which and the said discretionary powers

the whole action taken must be construed and weighed. If we concede that the law would admit of a reduction thereafter, and of the ultimate sum being made less, on the happening of either of the contingencies named, then no effect can be given to the said vote, by way of an implied contract, which would prevent that being done. Such legal powers can be restricted and controlled, if at all, only by means of some express agreement made with the stockholders, either embodied in the subscription or growing out of some regulation made in advance and expressly or impliedly referred to therein. The vote here is not to be confounded with that class of votes which operate *per se*, either as an increase or as fixing absolutely the amount of same to be, which vote, when passed, exhausts the power under which it is passed. Such votes have the force of legislation when passed. This is rather one of that class of cases where, when stockholders subscribe and pay in their money, they know that the proposal, as made to the Comptroller of the Currency, and as assented to by him with his approval certificate given, will and alone can determine the ultimate amount.

It follows that the so-called proposal made among the stockholders in the first instance is only the suggested amount for their action in an attempt among themselves to get the same, and is binding only for the purposes of an exercise of their pre-emptive rights and of determining forfeitures. There is no implication that the stockholders are to take and pay for the whole, but only that they shall have a right to do so or to decline at their election, as a matter of individual choice; and, if any decline and forfeit their rights, the directors having the proceedings and the regulation of the same in charge may then determine what shall be done about the rest. All prior to the submission of a proposal to the Comptroller is simply preliminary and preparatory thereto, as a mutual matter among the stockholders themselves, requiring their co-operation; and the application made to the Comptroller is in law the only contract proposition about it, and that, when accepted and made effectual, completes the contract with the government, in the shape of an amended charter.

If the ultimate amount must necessarily depend upon what is submitted to the Comptroller, and he accepts and approves in the exercise of his discretion (if all paid in), how can it be justly said that the original vote and notice necessarily fix the same unchangeably in advance? If the stock can by law be fixed and made valid at a less sum, how can it be justly implied that this should not or could not be done?

How can this Court raise an implied contract condition as between the association and each stockholder, based not on its own action in its corporate capacity, but solely on a vote passed by the directors in the exercise of special powers vested in them by virtue of the grant found in the articles of association, and being exerted in their behalf?

The implication as matter of law is that whatever satisfies the requisitions of the charter must satisfy the stockholders. Such is virtually agreed in the fundamental contract of membership. We do not deem it necessary to enter into a discussion of the controverted rule of law which has been established with some conflict of authority in the State Courts, and on the principle of which the State Court construct their theory. The rule has been dealt with exhaustively by Mr. Cook on the Law of S. & S., § 176 *et seq.*, with all of its qualifications, limitations, and exceptions, and with copious citations of legal authorities. Whether the rule applies to subscriptions for stock in a proposed increase thereof has been seriously questioned with authorities either way. What Mr. Cook says on that subject in § 288 and Mr. Morawetz in § 142, with the cases of Clarke *v.* Thomas, 34 Ohio St. 46, Nutter *v.* Lexington, etc., R. Co., 6 Gray, 85, cited, is not adopted in Eaton *v.* Bk., *supra*, in Reed *v.* Memphis Gas Co., 9 Heisk. 546, or in Winters *v.* Armstrong, *supra*. All we have to say about them is, we insist that, on the views heretofore expressed and on a charter such as we have here, there is no room for the rule, unless a form of subscription is adopted embodying a regulation to that effect; with a condition precedent to the obligation to pay the money that the stock should be first all subscribed, either by the stockholders, or by them and others under a determination to be made by the directors as provided in the by-law.

But to go further, and attempt to provide in the subscription for all future contingencies subsequent to the actual payment of the money in satisfaction of the promise made, on which an obligation to repay the money would accrue as upon a failure of the consideration, would be a subscription of a most anomalous character. Still more, to attempt to read into the subscription made by Mr. Aspinwall (Rec. p. 10), as drafted and signed by him, an implication covering all of the contingencies, and saying what the directors might do and should not do, in the event that the whole amount failed for any cause, would be an anomalous and a most extraordinary

proceeding, without principle of law or legal precedent to warrant the same. The existing powers and the law determine that matter.

That is a matter provided for in the principles of law governing failures of consideration depending upon a failure of the enterprise, or the validity of the stock created. The subscription made by an old stockholder is properly only an expression of what is implied in the election to be made, and Mr. Aspinwall as a lawyer understood this; for he only promised to take the fifty shares to which he was entitled, and to pay them on Oct. 1, 1881. This is quite different from a subscription for original stock or one made by a stranger, as in Reed *v.* Memphis Gas Co., *supra*, inasmuch as one gets only what the law gives him, while the rights of strangers rest in contract only. An outside subscription for stock forfeited by stockholders would be on such terms as the directors might prescribe.

The ordinary subscription is satisfied when the subscription is filled, whether the money is paid or not. And yet the State Court makes an implication, which embraces also the actual payment of the money and the favorable action of the Comptroller.

The rule does not apply where the charter or the law or the express agreement allows of the money being called, or requires it to be paid in at once, whether the whole has then been subscribed or not (Cook, §§ 177, 178).

Not one of the reasons which support the general rule applies here (Cook, § 175),— no prohibition of law, no public policy, no definite amount necessary to be got as essential to a successful carrying on of the business. The relative interest of each stockholder is preserved, and all pre-emptive rights are observed. The result satisfies the law.

The rule invoked obtains only in defence of suits brought to enforce a subscription, not to the money when paid in. When that is paid, the condition precedent is waived and the contract satisfied.

The State Court say that the condition is not waived because the law requires the money to be paid in advance. That is the reason why the rule does not apply at all to such a case (Cook, § 177; Railroad Co. *v.* Kinsman, 77 Me. 370).

In Winters *v.* Armstrong, *supra*, the rule is held to apply to a subscription for shares of increased capital stock in a National Banking Association. But the question did not properly arise in that case, because the defence there was an entire failure of consideration. The party suing was undoubtedly entitled, as his con-

sideration, to shares of valid stock; and he could not get them, because the consummation of the scheme had become impossible by reason of the failure of the bank and the appointment of a receiver. The case was rightly decided on that point, the decision resting on good judicial authority, as hereinbefore shown. Beyond that, it has no force as an authority.

It is said in that case that the implication is as matter of law, that the party is to have valid stock such as will confer upon him all the rights and privileges of a stockholder (p. 512). This is only another way of stating the proposition that such was the consideration, and that that will fail if this is not got.

In Chubb *v.* Upton, 95 U. S. 665, the general rule invoked is not adopted. The Court say this: "One who receives a certificate of stock for a certain number of shares, at a given sum per share, thereby becomes liable to pay the amount thereof when called upon by the corporation or its assignee. Nor is it necessary, to sustain the action, that there should have been a subscription for the whole amount named in the articles."

A fortiori, the money cannot be recovered back when once paid and the shares of stock taken.

The doctrine of the State Court leads to absurd results. It would put into every judgment and execution obtained in a suit on the subscription an implied condition, and attach it to payments enforced thereon.

We see no escape from the position that the Court must find the stock to be valid or invalid, and rest the conclusion on that issue.

A. A. Ranney
for Deft. in Error.

Supreme Court of the United States.

No. 957.

WM. ASPINWALL IN ERROR *v.* PETER BUTLER, *Receiver*.

AS TO MOTION OF THE PLAINTIFF IN ERROR.

The defendant in error does not object to the late filing of the two arguments of the plaintiff in error, in violation of the stipulation of the parties, nor to the motion made for leave to file another substantive answer, provided the same does not defeat the submission made under the rule, and he is allowed to submit the following supplementary and additional brief in the nature of a reply. The late filing of the said arguments, after his had been filed, prevented him from taking note of the same in his argument except by way of anticipation.

Assuming that the Court will grant the leave asked for upon the conditions named and subject to such contingency, we ask leave to submit also the following reply.

A. A. RANNEY.

REPLY.

We do not desire to go over the whole argument again, but only to notice a few of the points made by the other side.

1. There is nothing in the objection made to the appointment of the receiver, if the question is open on the record, which we deny. The appointment was made under the Act of June 30, 1876, upon a sufficient and now an undisputed

state of facts, and it is too late to question the soundness of the doctrine held in the following cases: —

Casey *v.* Galli, 94 U. S. 673.
Keyser *v.* Hitz, 2 Mackey, 473.
Cadle *v.* Baker, 20 Wall. 630.
Kennedy *v.* Gibson, 8 *id.* 498.
Nat. Bank *v.* Case, 99 U. S. 628.

It makes no difference that the receiver was not appointed for the reason stated in the notice or order of Dec. 16, 1881. The subsequent proceedings in laying the assessment of Jan. 10, 1882, and the collecting of the same, resulting in putting the bank into a solvent condition, as represented to the comptroller of the currency and as found by him, and in its resumption of business by his leave, stopped all further proceedings under said order.

2. It is not controverted that the fact that Mr. Aspinwall subscribed for and took the shares of new stock in his own name, and as of his own right, and he so appeared on the books of the bank, rendered him individually responsible, if at all, under the provisions of Rev. Stats., Sect. 5151, notwithstanding he held the same in equity in a fiduciary capacity. But the action of Mr. Aspinwall at the stockholders' meeting of Jan. 10, 1882, and subsequently in paying the assessment, as confined to the old stock, is not allowed to have its full effect as ratifying the proceedings had already, and those taken then and subsequently, in the resumption wrought and business continued, on the basis of a capital stock of $791,300 made good by the assessment. While he made himself personally liable as an individual by taking his stock in his own name (Nat. Bank *v.* Case, 99 U. S. 628; Davis *v.* So., 44 Conn. 586; cases cited and approved in Whitney *v.* Butler, 118 U. S.), he represented in a fiduciary capacity both the old and the new stock, because the

latter belonged to the son in equity, and he cannot sever his relation and action, or its ratifying effect in the premises, and say that, while he waived all objections and ratified the proceedings as to the old stock, so far as effected his son, he did not do that as to himself as the holder of the new stock, because he did not ostensibly act as trustee in taking the new stock.

3. Too great stress is laid upon the conduct of the plaintiff in error on Jan. 10, in that he and his counsel expressed an opinion, that the increased stock was illegal and invalid, and voted only on the old shares, and stated to Mr. Stone, the counsel acting for the bank, his position in that regard; and further, in that he paid the assessment on the old only, and paid no attention to the advertising and proposed sale of the new stock by reason of the non-payment of the assessment thereon. What was said and done at said meeting by counsel and client, was only by way of discussion and legal contention on one side and the other. They took a general ground applicable to the entire increased capital stock, not as applying to individual stockholders, not assenting thereto or as acting under special contract conditions, as did Miss Eaton in her demand made before the meeting was held. Mr. Stone was not the party to receive or accept a surrender, if proffered. The surrender of the certificate in repudiation of the stock, if designed and intended, should have been made to the officer or officers of the association, who alone had competent authority to act in the premises. The casting of a vote in the negative on the proposition submitted, limited to the old stock, to be counted and actually counted by a committee of the stockholders, had no legal effect as a surrender or a repudiation.

The court below was justified in law in finding ratification as a matter of fact by what succeeded. The plaintiff in error, finding that the scheme of rehabilitation and for a resumption

of business was succeeding, and had succeeded, proceeded on March 18, and participated in what was done by paying the assessment on the old stock in part by money enabled to be drawn by reason of the same, joining in the successful scheme and acting on the basis of valid stock of $961,300, and taking his chances of the ultimate success or failure of the bank in the future. He allowed the new stock to be advertised for sale, and the proceedings to go on, without protest or objection, presumably as a means of paying the assessment on the same. His acts in that regard the court below presumably regarded as done in that view, and not on the theory that he had successfully repudiated the shares and surrendered the certificate. It was his duty, otherwise, to have taken steps to prevent the advertisement and sale, or to have made his objection and claims known in some formal and significant way. It is not pretended, by the way, that a sale and transfer of the shares was actually perfected, so as to relieve the stock from liability. Such was not the fact, as the record shows. So long as the plaintiff in error knew that resumption was impossible on any other basis than a capital of $961,300, and that the proceedings were going on with that assumption and intent, the signification of his conduct on March 18, and subsequently in retaining his certificate and so acting without objection and without taking steps to have his name removed from the official stock registry, is conclusive that he had yielded his legal position taken on Jan. 10, and thereafter acted on the belief that the scheme had succeeded and that the bank was to go on continually.

The demand in writing, dated and made May 22, 1882, two days after the bank had actually failed and closed its doors to business, is the first action taken which amounted to an attempted repudiation and a surrender of the certificate. That was too late, and it was based on grounds which

were untenable upon the evidence, proofs, and the facts agreed and specially found by the court below. The rights of the creditors then were clear, and their lien on the assets and the personal liability fund secured by law, had attached and become absolute and enforceable. The receiver had been solicited and was actually appointed the same day, and his appointment took effect by relation on May 20, 1882, the date of the failure and insolvency declared by the vote of the directors passed on that day. While there was an outstanding indebtedness of $200,000, which had accrued after March 18, the prior creditors, in consideration of the vote of Jan. 10 and what had been done and was being done, and the proposed resumption, had extended the time of paying their debts, and this the conduct of Mr. Aspinwall had helped to induce. It is absurd for him now to contend that he as guardian and trustee was ratifying and joining in the proceedings, while repudiating them as an individual. It would, if so, convict him of infidelity to his trust, which is not presumable. It is enough on this state of facts that the court below found the intention and design of Mr. Aspinwall was to waive objections and to ratify the proceedings. It is clear that the law permitted it, and fully justified such a finding of fact. That finding of the intent and design as a question of fact is conclusive here, because this court is not to reverse the finding unless there was also an erroneous ruling in matter of law.

4. The adverse argument does not do justice and give proper force and effect to what had preceded Jan. 10, 1882, as a waiver and acquiescence on the theory contended for adversely, and under the suggested doctrine of the Delano case on that point. The original scheme of procedure was made independently of and in disregard of the by-law, in that no subscription was framed and opened with a time limited for subscriptions to be made, and in that it contemplated, with

an inducement held out by way of interest, the prepayment of the money at once as capital, without regard to what might be got in all, or what the ultimate amount of increase might be. This plan involved the right of the association to employ the money as capital and directly in the business of the bank as capital stock *de facto* and for the benefit of all concerned, as otherwise the payment of interest could not be afforded. This was wholly inconsistent with the condition theory set up. The plaintiff, while he did not anticipate his payment, concurred in the plan, drew his own contract in the shape of a simple expression of his election to take what he was entitled to, with a promise to pay at the time named. He carried it out. It makes no difference that he sought in vain to get more stock than he was entitled to, or that the president, in declining to let him have more than he was entitled to, gave an erroneous or even a false reason for it, so long as the fact had nothing to do with his subscribing or paying in the money as absolutely agreed by him in writing. His subsequent conduct in calling for and taking his certificate on Nov. 5, and remaining silent and wholly inactive during a period which was filled with notorious events, public and private, can only be reconciled on the theory of waiver and acquiescence in the irregular course pursued up to Dec. 13, and then in what was consummated in the making of an increase *de facto* already, one *de jure*. The discrepancy was so small, and the case so urgent in view of what had occurred and the present status and prospects, as regarded by those in authority and personally interested in the success of what was contemplated, waiver and acquiescence are to be presumed almost as matter of course. Certainly the case does not admit of a forced implication that the party acting was relying on any understanding such as is alleged now. Mr. Aspinwall presumptively knew on Nov. 5 that the comptroller had not acted in

the premises, as his action is of a public nature and official in its character. Being a lawyer, the presumption is strong against him. He cannot be allowed to stultify himself by pleading ignorance, when the law presumes knowledge from his conduct, want of diligence, etc., in a case of such importance and in an exigency affecting vitally his own pecuniary interests.

We still fondly cherish the hope that the court will make the broader adjudication asked for, as well as upon the minor questions referred to above. We have covered in the original argument the main issues of law, and will not repeat or urge our contention thereon anew to any extent at least.

1. It is to be observed that it is contended that the certificate for the stock is of no account, on the strength of Scoville *v.* Thayer (Argument No. 3, page 17, Sect. 54), the counsel not observing the distinction between a case of increased capital stock *ultra vires*, where no assent of the stockholders can render it valid, and one *intra vires*, where a condition or objection is set up which can be waived by the act of the party, and the proceedings involve only an irregularity as between the corporation and the member.

2. The fatal infirmity in the adverse argument is that after the vote of Sept. 13 the law did not admit of any increase short of $500,000. This is not true. The law and the charter did expressly allow of any sum within the maximum. This destroys that contention, as also the main, if not the entire, ground on which the court is asked to raise the implied condition contended for adversely. Nobody has ever denied before that the individual assent of the stockholders would render a less sum legal and valid as the perfected increase, or that a waiver or acquiescence on their part would be effectual as a cure of all objections to a reduction. The Delano case, Winters *v.* Armstrong, Eaton *v.* Bk., all recognize this doctrine.

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3. The opposite counsel do not overthrow the alleged policy of the banking act and of the charter for which we have contended, with which the contract condition would conflict, as tending to nullify or restrict the grant of powers made by the associated members to the directors. The attempt is to curtail those powers and limit their exercise to matters of detail in merely routine proceedings prescribed and fixed by law or a prior vote of the stockholders, whereas the powers, as we contend, extended to and embraced substantive provisions and regulations, comprehensive, exclusive and fundamental in their character, limited only by the prerequisites of validity prescribed in Sect. 5142, with no power reserved to the stockholders or for them to exercise. The power to provide and to regulate the manner of the execution is one well known and fully recognized in constitutions, in acts of legislation, and in constating agreements for the management of corporations and joint enterprises. These words, as used in the articles of association, are as comprehensive and far-reaching as the power specified in Sect. 5142. What is contended for adversely renders both the directors and the stockholders powerless when confronting certain well-known contingencies reasonably to be apprehended in a regular course of proceeding. It takes away all power from the stockholders without conferring it upon any one else, and, contrary to all sound principles of law, subjects an enterprise of the kind to the mercy and controlling power of any impecunious or recalcitrant member, not because of a legal prohibition, but in the face and eyes of an express statute and charter, and that solely on the ground of what the court is asked to imply as a mutual understanding of the parties as against the manifest policy of the same.

An attempt is made to lug in and use, out of place, a disputed rule of law applicable to suits brought to enforce subscription contracts, without one of the reasons which support

that rule even there, and with nothing substantial to justify it, and that, too, in plain disregard of the fact that the discrepancy proved to be so small and insignificant, that under the English decisions latterly that discrepancy would not be controlling. (Cook, Sect. 179, and cases; Johnson *v.* Goslet, C. B. [N. S.] 569.)

4. The opposite counsel say (Arg. 3, p. 15, Sect. 45; p. 10, Sect. 30) that the association, as such, had no authority in relation to the increase of capital. If so, how was the association engaged in making a contract with its members? This is a virtual concession of what we claim, to wit: that the directors were acting in the exertion of a particular and special power, in behalf of themselves and their co-stockholders, who had granted the same exclusively to them as their agents, and whose action made it the duty of the association to carry out what the directors determined; that the vote of Sept. 13 did not exhaust the power or become absolute as to amount, but the power continued until the scheme was consummated: that they had discretionary powers commensurate with the needs of the enterprise, subject as the ultimate amount was to various contingencies which were presumably in legal contemplation, both when the articles were framed and when the first vote was passed and the notice thereof given. The fatal error is in treating the association and the members as contracting parties in the ordinary sense, or, if so treated, in excluding all implied references to the provisions of the charter and the existing contingencies in the way, which might necessitate a change in the aggregate amount of the increase, and in ignoring what the law permitted as embraced in the implication made.

Had none of the stockholders elected to take their *pro rata* of proposed new stock the whole of it could have been allowed to be taken outside if the directors so determined.

We urge again, in conclusion, that the only issue open is

as to whether Mr. Aspinwall was a stockholder owning fifty shares of stock on May 20, 1882. That he held then that number of shares, with every known *indicia* and evidence of ownership, is undisputed; that the same were legal and valid stock there is no doubt.

The opposing argument, No. 3, page 20, speaks of "weak and feeble implications." Certainly the counsel errs in so characterizing an express and positive obligation of law, creating a personal liability on the part of a shareholder. The remark has some significance and force when applied to the implied contract condition, which he relies on, and asks the Court to find, so as to vitiate ownership.

The last adverse argument is too voluminous and too involved and complicated in its propositions and supposed logic and learning to admit, in the short time which I have had since seeing it, of a more extended refutation of the same, in all its infinite details.

We notice only a few other points. This is conceded (p. 13, Sect. 36): —

"The principle is conceded to the other side, that, where the corporate action is regularly taken, it cannot be avoided by an individual shareholder upon the ground of fraudulent conduct as to him on the part of officers of the corporation."

How, then, can any implied contract, as between the directors and members, avail to defeat an amendment of the charter legally effected? The argument also ignores the assent in advance wrought by the authority given by the members to the directors as co-stockholders.

The argument labors in vain (pp. 16–18) to show that a surrender of the stock was unnecessary, and to make conduct which left the client free to assert ownership or to disclaim it, at any subsequent time, according as the bank might succeed or fail, consistent with the repudiation now alleged. If there was a right to repudiate at all it is easy to see what

would have been effectual as such in law, and that what was done did not amount to such. When the stock was advertised to be sold the bank was apparently in a solvent condition and the stock was of value. It was emphatically incumbent then upon the plaintiff to repudiate if he so intended.

A. A. RANNEY.